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JUSTICE BLACK, THE FIRST AMENDMENT, AND THE BURGER COURT
Tinsley E. Yarbrough

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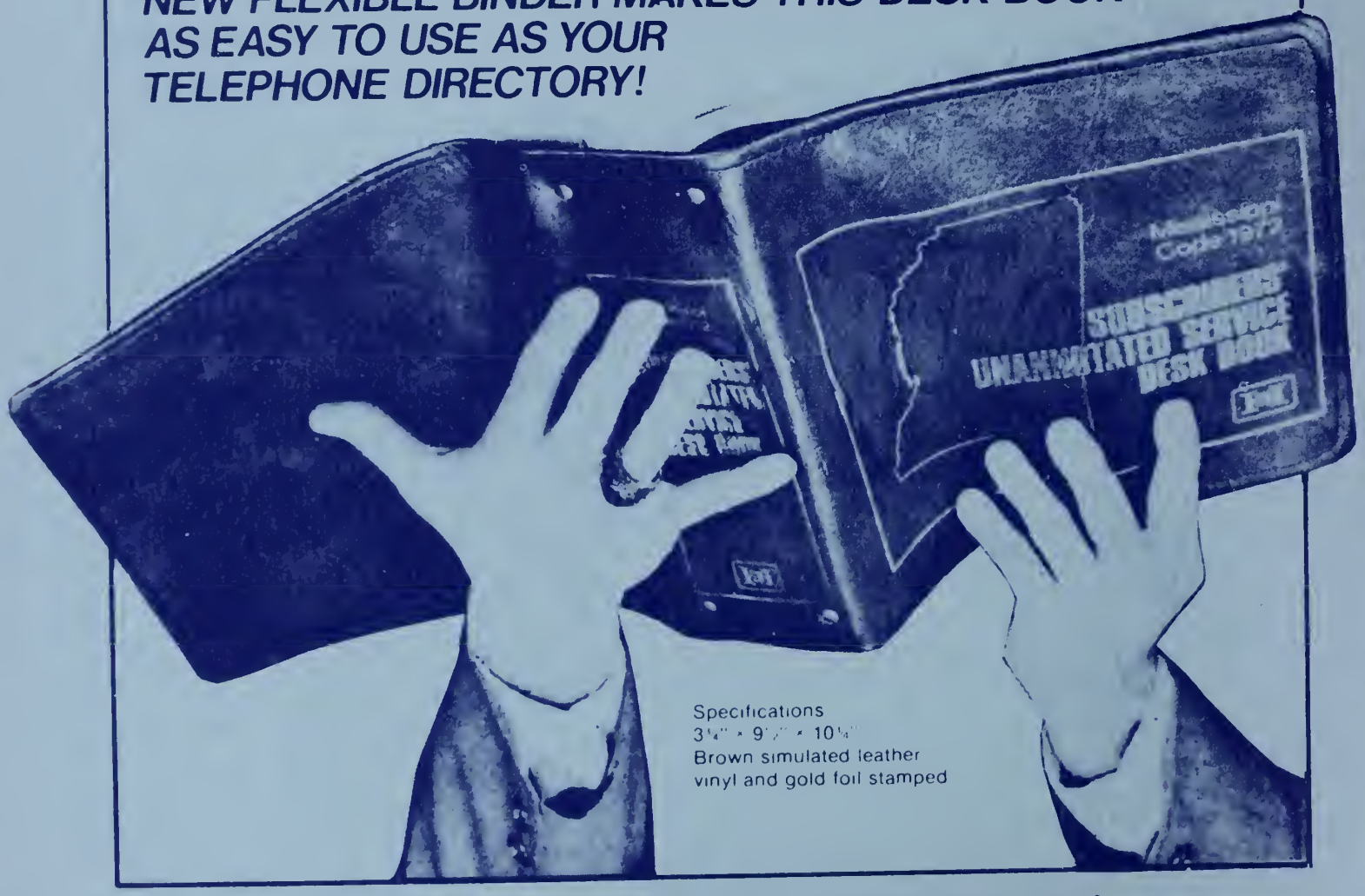

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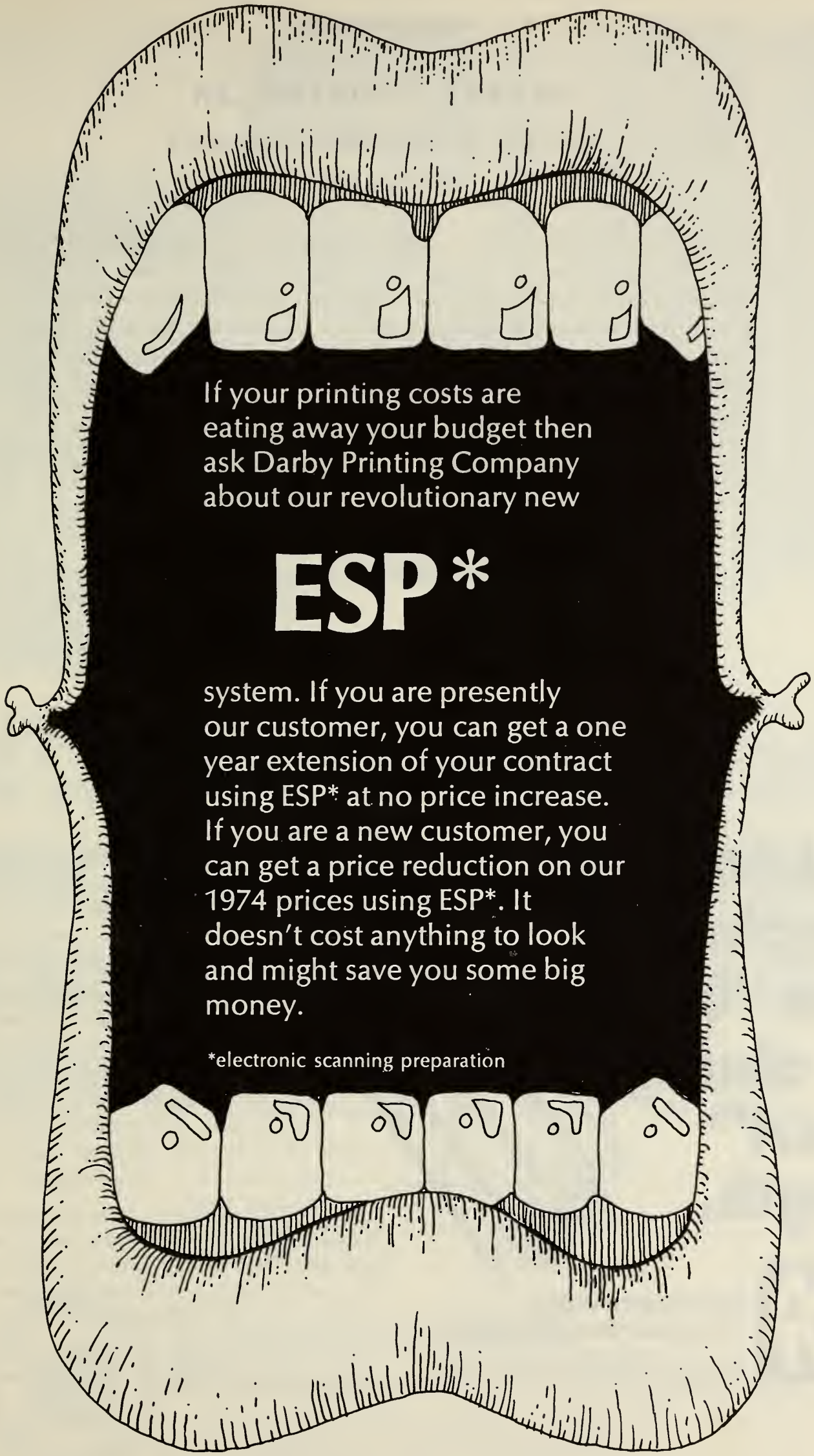
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JUSTICE BLACK, THE FIRST AMENDMENT, AND THE BURGER COURT

*Tinsley E. Yarbrough**

When a jurist leaves his seat on a collegial court after a long and influential career, questions invariably arise regarding his probable response to issues coming before the court subsequent to his departure, the impact of his thinking on later decisional and doctrinal trends, and the effect of his absence from the court on voting patterns and opinions. When the jurist is Hugo Lafayette Black and the issue is the first amendment, the urge to investigate such questions is particularly compelling, for Justice Black's judicial service spanned most of the modern Supreme Court's history and his first amendment philosophy was both unique and extremely controversial.

This article examines Justice Black's first amendment jurisprudence from the perspective of Burger Court decisions rendered since his retirement and death in September 1971. Hopefully, by focusing on a somewhat different set of issues than those which confronted the Court during his tenure, such a study will provide further insight into the Justice's first amendment philosophy, its strengths and its weaknesses.

I. Speech-Plus and Symbolic Speech

Applying a "literal" interpretation to the first amendment, Justice Black refused to accord picketing and the other forms of "speech-plus" any direct protection under that amendment's provisions. Such activities, he contended, involved "more than 'speech,' more than 'press,' more than 'assembly,' and more than 'petition,' as those terms [were] used in the First Amendment."[1] Thus, government could subject these activities to regulations of time, place, and manner, or ban them completely. Along these same lines, Justice Black opposed the notion that the first amendment incorporates a right to go onto public or private property for purposes of communicative activity, whatever its nature. He realized that controls over speech-plus and the uses of property could impose "indirect" burdens on first amendment freedoms. He maintained, however, that such regulations were valid if nondiscriminatory, free of vagueness and overbreadth, supportive of governmental interests sufficiently important to justify indirect burdens on protected freedoms, and if the means chosen to accomplish the legitimate governmental

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[1] Gregory v. City of Chicago, 394 U.S. 111, 124 (1969) (Black, J., concurring).

purpose are the least burdensome of expression.

Justice Black developed his speech-plus position most extensively in opinions which he filed in political protest cases decided by the Court during the 1960's.[2] His thinking is also reflected in his opinions in labor-picketing, handbill, and other cases of the 1940's,[3] and in his off-the-bench statements.[4] Further evidence of his views—and the consistency with which he adhered to them throughout his judicial career—can be found in the notes of deceased Justices recounting Justice Black's participation in the Court's conference debates. The papers of Justice Murphy reveal, for example, that in a number of early labor-picketing cases, Justice Black asserted in conference that a narrowly drawn statute aimed at the suppression of all picketing would pose no constitutional difficulties for him.[5] Justice Rutledge's conference notes for *Giboney v. Empire Storage & Ice Co.*[6] are equally relevant. In *Giboney*, Justice Black spoke for a unanimous Court in a forceful opinion upholding an antipicketing injunction designed to prevent a conspiracy in restraint of trade. Justice Rutledge's notes indicate that Justice Black apparently first favored reversal in *Giboney*, but not because of any sentiment that picketing per se is entitled to constitutional protection. On the contrary, he was simply concerned that the injunction at issue in the case was

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[2] *See, e.g.*, Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536, 575 (1965) (concurring and dissenting).

[3] *See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Jamison v. Texas, 318 U.S. 413 (1943); Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722, 729 (1942); Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 299 (1941). For a discussion of Justice Black's participation in such cases, see Yarbrough, *Justice Black and His Critics on Speech-Plus and Symbolic Speech*, 52 TEXAS L. REV. 257, 261-71 (1974).

[4] *See* H. BLACK, A CONSTITUTIONAL FAITH 43-63 (1969). *See generally Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962), in which Justice Black observed:

> Nobody has ever said that the First Amendment gives people a right to go anywhere in the world they want to go or say anything in the world they want to say. . . . We have a system of property in this country which is also protected by the Constitution. We have a system of property, which means that a man does not have a right to do anything he wants anywhere he wants to do it. For instance, I would feel a little badly if somebody were to try to come into my house and tell me that he had a constitutional right to come in there because he wanted to make a speech against the Supreme Court. I realize the freedom of people to make a speech against the Supreme Court, but I do not want him to make it in my house.

Id. at 558. *See also Text of Historic TV Interview of Justice Black*, 27 CONG. Q. WEEKLY REP. 6 (1969).

[5] *See, e.g.*, Justice Murphy's conference notes for Bakery Drivers Local 802 v. Wohl, 315 U.S. 769 (1942), and Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942), on file in the *Frank Murphy Papers*, Container 62, Michigan Historical Collection, University of Michigan.

[6] 336 U.S. 490 (1949).

overly broad, and he was reluctant to uphold an antipicketing injunction in the absence of a state law specifically proscribing such activities.[7]

Justice Black never fully articulated his position regarding the constitutional status of communicative conduct, or "symbolic speech." Even so, particularly since symbolic speech by definition involves no element of "pure" speech, it seems clear that Justice Black considered communicative conduct entitled to no constitutional protection except that implicit in the equal protection and due process guarantees. His participation in symbolic speech cases decided by the Court during his tenure certainly lends support to such a conclusion.

Justice Black had not yet joined the Court when its first symbolic speech decision was rendered in *Stromberg v. California*,[8] declaring unconstitutionally vague a statute which prohibited the public display of a red flag as a symbol of opposition to organized government. In *West Virginia Board of Education v. Barnette*,[9] he joined the Court in upholding first and fourteenth amendment claims against state-prescribed flag saluting and recitation of the pledge of allegiance to the flag in public schools. Justice Black's brief opinion, in which Justice Douglas joined, indicated his "substantial" agreement with Justice Jackson's majority opinion, which had included the observation that: "Symbolism is a primitive but effective way of communicating ideas."[10] The Jackson opinion had noted however, that the flag salute was a form of utterance "in connection with the pledges."[11] Moreover, Justice Black explained that he and Justice Douglas earlier had joined a decision upholding a similar flag exercise because of their "[r]eluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare."[12] And, too, his opinion in the case focused on the dangers which mandated flag ceremonials posed for religious freedom rather than on the free expression considerations which the majority opinion had emphasized.

A number of the civil rights and antiwar protest cases decided by the Court during Justice Black's last years on the bench involved communicative conduct claims; in none of these cases did Justice Black reveal the slightest enthusiasm for the symbolic speech concept. During the early 1960's, he joined several decisions overturning sit-in convic-

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[7] Justice Rutledge's papers have never been properly organized and indexed. They are presently stored in the Yale Law Library. Justice Rutledge's *Giboney* notes are in Container 24.

[8] 283 U.S. 359 (1931).

[9] 319 U.S. 624 (1943).

[10] *Id.* at 632.

[11] *Id.*

[12] *Id.* at 643.

tions, but the decisions rested on due process or equal protection grounds.[13] In *Brown v. Louisiana*,[14] Justice Black dissented from the reversal of the breach-of-peace convictions of participants in a library sit-in. Although its theme was the breadth of state authority over the uses of public property, his *Brown* dissent also contained language reflecting concern about the broader implications of Justice Fortas' majority assertion that first amendment rights "are not confined to verbal expression. They embrace appropriate types of action . . . ."[15] State control over property was also the theme of his dissent in *Tinker v. Des Moines Independent Community School District*,[16] which ordered reinstatement of students suspended from school for wearing black armbands as a form of protest against United States military policy. At one point in his opinion, however, he assumed "that the Court [was] correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment"[17]—and then promptly invited the reader to see his opinion for the Court in an earlier case[18] upholding state power over speech-connected conduct.

In *Street v. New York*,[19] Justice Black dissented from the reversal of a conviction under a state statute making it an offense publicly to mutilate a United States flag or cast contempt upon a flag by word or act. Street had been arrested after he burned an American flag on a Brooklyn street and told passers-by, "We don't need no damn flag." The majority concluded that the defendant's conviction could have been based on his words rather than on his burning of the flag and reversed the conviction without examining the constitutional status of flag-burning designed to communicate an idea. In a brief dissent Justice Black concluded that the defendant's conviction had ultimately rested on the act of burning the flag and exclaimed: "It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense."[20]

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[13] *See, e.g.*, Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963); Garner v. Louisiana, 368 U.S. 157 (1961); *cf.* Bell v. Maryland, 378 U.S. 226, 318 (1964) (Black, J., dissenting).

[14] 383 U.S. 131 (1966).

[15] *Id.* at 142.

[16] 393 U.S. 503 (1969).

[17] *Id.* at 517.

[18] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[19] 394 U.S. 576 (1969).

[20] *Id.* at 610. In his *Street* dissent, Justice Black expressed approval of the "excellent" opinion filed in the case by Chief Judge Stanley H. Fuld for the New York Court of Appeals. Justice Black no doubt strongly concurred with certain language in Chief Judge Fuld's opinion, including the observation that:

Finally, in *Schacht v. United States*,[21] Justice Black spoke for the Court in overturning a federal regulation prohibiting the unauthorized wearing of a military uniform in theatrical productions tending to discredit the armed forces. His opinion indicates, however, that he viewed the regulation as an infringement on "pure" speech. He agreed that Congress could constitutionally prohibit the unauthorized wearing of a military uniform but held that, under the challenged regulation, Congress had "in effect made it a crime for an actor wearing a military uniform to *say things* during his performance critical of the conduct or policies of the Armed Forces."[22]

Given the stance which he assumed in the protest cases of the 1960's, it is probable that Justice Black would have concurred in the Burger Court's disposition of the few speech-plus cases decided since his death. Undoubtedly he would have joined the majority's application of equal protection standards in *Police Department v. Mosley*[23] and *Grayned v. City of Rockford*[24] to invalidate ordinances which banned picketing near schools but exempted peaceful picketing of any school involved in a labor dispute.[25] He would have concurred in the Court's decision in *Grayned* to uphold an antinoise ordinance making it a crime for a person on grounds adjacent to a school building to make a noise or diversion tending to interfere with the peace and good order of school sessions.[26] Justice Marshall's majority opinions in *Mosley* and *Grayned*, however, tracked the reasoning of earlier cases in which the Court had held that the forms of speech-plus are entitled to constitutional protection but may be subjected to reasonable regulations of time, place, and manner. Justice Black might have wished, therefore, to restate his differences with the prevailing view. Ironically, given his support for broad governmental authority in the speech-plus field, he might also have expressed opposition to Justice Marshall's conclusion for the majority that there might be "sufficient regulatory interests justifying selective exclusions or distinctions among pickets,"[27] so long as such decisions

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> The State may, under its police powers, proscribe many forms of conduct which threaten the peace, security or well-being of its inhabitants, and the Constitution does not require that an exception be made for prohibited activities to which some persons would ascribe symbolic significance . . . .

People v. Street, 20 N.Y.2d 231, 234-35, 229 N.E.2d 187, 189, 282 N.Y.S.2d 491, 494 (1967). However, he probably rejected certain portions of the Fuld opinion summarizing prevailing doctrine in the symbolic speech field.

[21] 398 U.S. 58 (1970).

[22] *Id.* at 62-63 (emphasis added).

[23] 408 U.S. 92 (1972).

[24] 408 U.S. 104 (1972).

[25] *Cf.* Cox v. Louisiana, 379 U.S. 536, 580-81 (1965) (Black, J., concurring and dissenting).

[26] *Cf. id.* at 581-84.

[27] 408 U.S. at 98.

would "not be based on . . . [or] justified by reference to content alone."[28] Justice Black would have been skeptical of any policy providing for selective exclusion of pickets and would have vehemently opposed exclusion based in any way on the content of the pickets' placards.[29]

Flower v. United States,[30] decided during the same term as *Mosley* and *Grayned*, summarily reversed the conviction of a civilian member of the American Friends Service Committee who had distributed leaflets on a military post. Flower had previously been barred from the post for attempting to distribute "unauthorized" literature, and his conviction rested on a federal statute making it an offense to reenter a military post after having been removed and ordered not to reenter by the officer in charge. In view of the specialized nature of the property involved in the case and the form of the statute on which Flower's conviction was based, Justice Black might not have acquiesced in *summary* reversal. It does seem likely, however, that he ultimately would have agreed with the Court's conclusion that since the street on which the leaflets had been distributed was open to the public, the military had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue."[31] Certainly, such an approach would have been compatible with his stance in early handbill cases.[32]

Justice Black might have challenged Justice Rehnquist's dissent in *Flower*—a dissent which purported to rely in part on Justice Black's majority opinion in *Adderley v. Florida*,[33] a 1966 case upholding the trespass convictions of civil rights protesters who had demonstrated on the grounds of a jail. Justice Rehnquist cited *Adderley* as support for his view that so long as a ban is applied in an evenhanded fashion, leafleteers may be denied access to military posts in the interest of "military morale and security," even though pedestrian and vehicular traffic are allowed.[34] Justice Rehnquist may have given *Adderley* an inaccurate reading. In rejecting the contention that the trespass convictions had been motivated by the demonstrators' views, Justice Black wrote in *Adderley:* "There is no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather

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[28] *Id.* at 96.

[29] In Cox v. Louisiana, 379 U.S. 536, 580 (1965) (concurring and dissenting), for example, Justice Black observed: "I believe that the First and Fourteenth Amendments require that if the streets of a town are open to some views, they must be open to all."

[30] 407 U.S. 197 (1972).

[31] *Id.* at 198.

[32] *See, e.g.*, Jamison v. Texas, 318 U.S. 413 (1943).

[33] 385 U.S. 39 (1966).

[34] 407 U.S. at 201.

on this portion of the jail grounds *for any purpose*."[35] The central thrust of *Adderley*, in other words, is not that government can bar demonstrators from public property while allowing general access by other members of the public, but that government can forbid all entry to certain forms of property by persons whose activities are unnecessary to its operations. In other contexts, of course, Justice Black defended general state authority to prohibit all picketing on public streets.[36] He never suggested, however, that such a ban could be based on a desire to promote government or public "morale." Moreover, he consistently drew constitutional distinctions between picketing and the sort of leafleting involved in *Flower*. In his view, the legitimate governmental interests justifying a ban on the former were obviously more compelling than those underlying suppression of the latter.[37]

During the 1973 term, the Burger Court decided two cases involving symbolic uses of the American flag. In *Smith v. Goguen*,[38] the Court declared a Massachusetts statute proscribing "contemptuous treatment" of the United States flag unconstitutionally vague for failing "to draw reasonably clear lines between the kinds of nonceremonial treatment [of the flag] that are criminal and those that are not."[39] Justice Powell's opinion for the majority declined to consider overbreadth claims raised against the statute, but separate opinions did reach that issue. In a concurring opinion, Justice White rejected the majority's contention that the statute was vague as applied to Goguen, who had been convicted for wearing a small flag sewn to the seat of his trousers. He also argued, however, that the statute infringed first and fourteenth amendment standards by allowing punishment of persons who "communicate[d] ideas about the flag unacceptable to the controlling majority in the legislature."[40] In a brief dissent, Justice Blackmun,

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[35] 385 U.S. at 47 (emphasis added).

[36] In one protest case, for example, he wrote: "I have no doubt about the general power of [a state] to bar all picketing on its streets and highways." Cox v. Louisiana, 379 U.S. 536, 581 (1965) (concurring and dissenting).

[37] *Compare, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943) (handbills); Jamison v. Texas, 318 U.S. 413 (1943), *with* NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 76 (1964) (concurring) (labor picketing); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), *and* Adderley v. Florida, 385 U.S. 39 (1966) (speech-plus protest); Cox v. Louisiana, 379 U.S. 536, 575 (1965) (concurring and dissenting). Note also the distinctions which a former Justice Black law clerk has drawn between the state interests underlying handbill regulations of the sort applied against a Jehovah's Witness in *Jamison*, and those asserted to justify controls over protest demonstrations—distinctions which Justice Black undoubtedly recognized. Howard, *Mr. Justice Black: The Negro Protest Movement and the Rule of Law*, 53 VA. L. REV. 1030, 1077-78 (1967).

[38] 415 U.S. 566 (1974).

[39] *Id.* at 574.

[40] *Id.* at 588.

joined by Chief Justice Burger, agreed with Justice White on the vagueness question but maintained that, as authoritatively construed in the state courts, the flag statute reached only affronts to the flag's "physical integrity," not "speech—a communicative element."[41] Justice Rehnquist, also joined by the Chief Justice, filed a more elaborate dissent in which he firmly embraced the symbolic speech concept but concluded that the statute furthered overriding governmental interests in safeguarding the "physical integrity" of the flag, "a unique national symbol which has been given content by generations of . . . our forebears."[42] Justice Rehnquist, joined by Justice White and Chief Justice Burger, continued this theme in dissenting from the disposition of *Spence v. Washington*,[43] which overturned on first and fourteenth amendment grounds a statute forbidding public display of a United States flag with any mark added, as applied to a student protester who had suspended a flag bearing a peace symbol upside down from his apartment window.[44] While some of the present Court's more conservative members are quite receptive to governmental authority over such activities, none seems willing to adopt Justice Black's broad objections to incorporating symbolic speech into the company of first amendment values.[45]

Since communicative conduct includes no element of "pure" speech, Justice Black probably would have denied symbolic speech even the partial first amendment protection which he was willing to extend speech-plus under the balancing doctrine.[46] It is by no means certain,

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[41] *Id.* at 591.

[42] *Id.* at 604.

[43] 418 U.S. 405 (1974) (per curiam).

[44] In accepting the view that the appellant's action constituted expression within the meaning of the first and fourteenth amendments, the Court noted that for decades "the communicative connotations of the use of flags" had been judicially recognized. *Id.* at 410. The appellant, the Court concluded, had "displayed [the flag] as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas," and "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired" by the student's gesture. *Id.* at 415.

[45] Holdovers from the Warren Court era have clearly embraced the symbolic speech concept. *See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). Justice Powell joined the *Spence* per curiam opinion and thereby indicated his acceptance. Justice Rehnquist's dissents in *Goguen* and *Spence* show that he has no objections to including symbolic speech within the first amendment's scope; Chief Justice Burger joined each of these opinions. Of the Court's present members, only Justice Blackmun's position remains unclear since he registered only a brief and somewhat enigmatic dissent in *Goguen* and merely concurred without opinion in *Spence*. It is probable, however, that he, too, agrees that the first amendment provides protection for communicative conduct as well as "pure" speech.

[46] As noted previously, Justice Black subscribed to the notion that regulation of speech-plus activities

> would be unconstitutional if under the circumstances it appeared that the

however, that he would have rejected all constitutional claims raised by those penalized for communicative conduct. In *Goguen*, for example, he might well have joined the majority on vagueness-due process grounds. Moreover, as noted previously, he would not have been totally unreceptive to equal protection claims raised in symbolic speech contests. In communicative conduct cases as in certain other fields of litigation,[47] however, Justice Black favored application of the lenient standards implicit in traditional equal protection doctrine. While sitting as Circuit Justice during his last term on the Court, for example, he refused to vacate a stay of injunction pending appeal in a case involving equal protection challenges to an El Paso, Texas, school hair-length rule. In a brief in-chambers opinion explaining his position, he wrote:

> It is true that we have held that this Court does have power under the Fourteenth Amendment to bar public schools from discriminating against Negro students on account of their race but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which, like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the States. There is no such direct, positive command about local school rules with reference to the length of hair state school students must have. And I cannot now predict this Court will hold that the more or less vague terms of either the Due Process or Equal Protection Clause have robbed the States of their traditionally recognized power to run their school systems in accordance with their own best judgment as to the appropriate length of hair for students.[48]

State's interest in suppressing the conduct was sufficient to outweigh the individual's interest in engaging in conduct closely involving his First Amendment freedoms.

Cox v. Louisiana, 379 U.S. 536, 577 (1965) (Black, J., concurring and dissenting).

[47] Justice Black's dissenting opinion in Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966), was perhaps the most complete statement of his views regarding the content of the equal protection guarantee. For discussion of his equal protection position, see Howard, *supra* note 37, at 1062-66; Yarbrough, *Justices Black and Douglas: The Judicial Function and the Scope of Constitutional Liberties*, 1973 DUKE L.J. 441, 472-83.

[48] Karr v. Schmidt, 401 U.S. 1201, 1202 (1971). In response to the claim that the controversy over school hair-length rules was about to reach national "crisis" proportions, it might be added, Justice Black further observed:

> The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear
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> . . . .

Id. at 1202. Over the objections of Justices Douglas and Marshall, the Burger Court has continued to avoid the issue. *See, e.g.*, New Rider v. Board of Educ., 414 U.S. 1097 (1974).

Justice Black maintained that speech-plus regulations, ostensibly directed at conduct within state power, were actually aimed at protected speech and thus both violative of equal protection and "censorship in a most odious form," Cox v. Louisiana, 379 U.S. 536,

Justice Black's position in the speech-plus and symbolic speech fields was the only stance which he could have assumed consistent with his absolutist conception of the first amendment. As is well known, Justice Black long held that direct abridgment of first amendment freedoms is absolutely forbidden.[49] Had he accepted the notion that the varieties of speech-plus and symbolic speech are entitled to any direct first amendment protection, he logically would have been required either to endorse absolute protection for such activities or to abandon absolutism and conclude that all first amendment rights are subject to some degree of direct governmental control. The clear-cut lines which he attempted to draw between activities within the first amendment's scope and those beyond its protection, and between "direct" and "indirect" burdens on expression, enabled him to reject both these untenable alternatives. His approach aroused considerable criticism,[50] which focused, *inter alia*, on the difficulty of applying his formula in specific contexts. By refusing to embrace an absolutist philosophy in every first amendment field, the members of the present Court have circumvented the dogmatism which Justice Black's absolutism compelled in speech-

581 (1965) (concurring and dissenting), if the regulations were written or applied in a discriminatory manner. One might conclude that Justice Black would view discriminatory regulations of symbolic speech as vulnerable to the same sort of charge. It is likely, however, that censorship claims were constitutionally relevant for Justice Black only where challenged statutes touched "pure" speech or other forms of expression included within his "literal" interpretation of the first amendment's provisions.

[49] Justice Black apparently first began to move toward a public espousal of absolutism in Dennis v. United States, 341 U.S. 494, 579 (1951). Speaking for the Court 10 years earlier in Bridges v. California, 314 U.S. 252 (1941), however, Justice Black gave the "clear and present danger" test a very libertarian interpretation and maintained that earlier cases invoking the doctrine

> d[id] not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a *minimum compulsion* of the Bill of Rights. For the First Amendment does not speak *equivocally*. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that *explicit language*, read in the context of a liberty-loving society, will allow.

Id. at 263 (emphasis added). Even this expansive statement probably did not reflect the ultimate limits of Justice Black's views at that time regarding the scope of the first amendment. Justice Frankfurter's papers reveal that the *Bridges* Court had originally voted to reject the first amendment claims raised in the case but that the vote shifted after Justice Black circulated a "fierce dissent." Letter from Justice Felix Frankfurter to Justice John Marshall Harlan, May 19, 1961, on file in the *Felix Frankfurter Papers*, Library of Congress. Under these circumstances, one may conjecture, Justice Black may well have moderated his first amendment views—for opinion purposes—in order to gain and hold a majority.

[50] The most thorough critique to appear thus far is McBride, *Mr. Justice Black and His Qualified Absolutes*, 2 LOYOLA (L.A.) L. REV. 37 (1969).

plus and symbolic speech cases—and the criticism which that dogmatism attracted.

Justice Black's stance, however, avoided certain conceptual problems with which the prevailing position must eventually cope. *United States v. O'Brien*[51] rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[52] But the Court

> has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression.[53]

Professor Thomas Emerson suggests that such a test might focus on whether expression or action is the "predominant" element in conduct claimed to be communicative.[54] Another commentator has recommended adoption of an "assertive" standard under which conduct would be viewed as expressive if it "is a departure from the actor's normal activities and cannot adequately be explained unless a desire to communicate is presumed."[55] Still another student of the symbolic speech concept, citing obvious weaknesses in these approaches, has outlined a formula which minimizes efforts to determine the intent behind conduct claimed to be communicative and focuses instead on the nature of governmental interests asserted as justification for the conduct's regulation or suppression.[56] To date, the Court has largely evaded facing the issue by simply declining to review symbolic speech claims except in those cases where the communicative character of the conduct at issue was beyond dispute.[57] At some point, however, the Court must provide lower courts with guidance in this area.

Acceptance of the symbolic speech concept means, too, that allegations of what one writer[58] has termed "overnarrowness" are relevant in communicative conduct cases. Traditionally, the courts have con-

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[51] 391 U.S. 367 (1968).

[52] *Id.* at 376.

[53] Cowgill v. California, 396 U.S. 371, 372 (1970) (Harlan, J., concurring in dismissal of appeal).

[54] T. Emerson, The System of Freedom of Expression 80 (1970).

[55] Note, *Symbolic Conduct*, 68 Colum. L. Rev. 1091, 1117 (1968).

[56] Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. Rev. 29 (1973).

[57] In Cowgill v. California, 396 U.S. 371 (1970), for example, the Court dismissed the appeal of a person who had worn a vest fashioned from a cut-up American flag. In a brief concurrence, Justice Harlan observed that the record of the case did "not adequately flush the . . . issue of whether there is a recognizable communicative aspect to appellant's conduct . . . ." *Id.*

[58] Nimmer, *supra* note 56, at 40.

demned as overbroad those statutes which sweep within their scope protected freedoms as well as conduct subject to governmental control. An "overnarrow" statute, on the other hand, is one which regulates or prohibits only that portion of conduct within a general category which has a communicative impact. Whereas a statute prohibiting the burning of bolts of cloth might not be overly narrow, a statute directed only at the burning of a particular cloth product, *e.g.*, a flag, might raise serious overnarrowness questions, since the only motivation underlying such a regulation might be opposition to the proscribed conduct's communicative effect. By rejecting the symbolic speech doctrine entirely, Justice Black's first amendment jurisprudence avoided the difficult questions implicit in the overnarrowness concept. Under the prevailing view, however, such questions cannot be ignored.

II. The Direct-Indirect Dichotomy

Critics have charged that the concept of direct and indirect infringments of expression which Justice Black espoused in speech-plus and other first amendment contexts[59] may require inquiries into governmental motives which courts ordinarily seek to avoid,[60] is often difficult to apply in concrete situations,[61] and "[i]n the hands of a less sensitive judge than Justice Black . . . could yield results that by his standards would be quite perverse."[62] Justice Black was obviously aware that judges can easily disagree over the definition and application of the direct-indirect dichotomy. Justices Frankfurter and Harlan, his chief first amendment antagonists, appeared to concede, for example, that only indirect abridgments of expression and association could be saved by application of a balancing test, but they vigorously disagreed with Justice Black over what constituted an indirect burden. Whereas Justice Black included within that category only those regulations which by their terms reached matters clearly subject to state control, Justices Frankfurter and Harlan apparently attached the indirect-burden label to any infringement of expression designed ultimately to further some governmental objective unrelated to the suppression of ideas.[63] Justice

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[59] Jutice Black first explicitly set forth his direct-indirect dichotomy in Barenblatt v. United States, 360 U.S. 109, 141 (1959) (dissenting). In *Barenblatt*, Justice Black traced the origins of the concept to early handbill and related first amendment cases, citing Cantwell v. Connecticut, 310 U.S. 296 (1940) and Schneider v. State, 308 U.S. 147 (1939).

[60] *See, e.g.*, McBride, *supra* note 50, at 51-52.

[61] *See, e.g.*, Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A.L. Rev. 467, 472 (1967); McBride, *supra* note 50, at 49-52.

[62] Freund, *supra* note 61, at 472.

[63] *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 49-52 (1961) (Harlan, J.); Barenblatt v. United States, 360 U.S. 109 (1959) (Harlan, J.); Dennis v. United States, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring).

Black was also aware of the need to avoid inquiries into governmental motive.[64] It was his view, however, that an absolutist conception of the first amendment which failed to draw direct-indirect distinctions would make enforcement of virtually all regulatory statutes a practical impossibility, since most governmental controls can in some way be construed to impose burdens on speech or other first amendment guarantees.[65] By confining his absolutist philosophy to direct abridgments of first amendment freedoms, while agreeing that indirect burdens could be evaluated by resort to a balancing test, Justice Black hoped to retain absolutism in certain first amendment contexts, allow states ample power over speech-related conduct, and ensure "the complete protection of First Amendment freedoms even against purely incidental or inadvertent consequences."[66]

The fact patterns of a number of cases decided by the Burger Court since Justice Black's death reflect apparent weaknesses in his direct-indirect dichotomy. In *Branzburg v. Hayes*[67] and two companion cases,[68] a five-four majority rejected first amendment claims of a testimonial privilege for newsmen ordered to appear and testify before grand juries. Media representatives asserted a constitutional privilege from appearing or testifying unless they had information of relevance to a grand jury investigation, the information was available from no other sources, and the need for the testimony outweighed the first amendment interest in preventing disclosure. Justice White conceded for the majority that grand jury subpoenae of reporters might inhibit news sources, and he asserted that the courts stood ready to protect the press from grand jury "harassment . . . undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources . . . ."[69] He emphasized, however, that not every "incidental burdening of the press that may result from the enforcement of civil or criminal statutes"[70]

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[64] *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 225 (1971); Epperson v. Arkansas, 393 U.S. 97, 112-13 (1968) (Black, J., concurring).

[65] Interview with Justice Hugo L. Black in Washington, D.C., Aug. 31, 1970. Note also his observation in *Giboney*:

> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed . . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

336 U.S. at 502.

[66] Konigsberg v. State Bar, 366 U.S. 36, 68 (1961) (Black, J., dissenting).

[67] 408 U.S. 665 (1972).

[68] *In re* Pappas and United States v. Caldwell.

[69] 408 U.S. at 707-08.

[70] *Id.* at 682.

amounted to a violation of the first amendment and rejected the sort of case-by-case balancing implicit in the asserted privilege. In dissent, Justice Stewart, joined by Justices Brennan and Marshall, urged acceptance of a partial privilege for the press virtually identical to that advanced by the newsmen-litigants, while Justice Douglas cited the dangers to free expression inherent in balancing tests and advocated an absolute privilege. If, in applying a direct-indirect formula to the *Branzburg* fact pattern, one emphasizes that newsgathering is within the scope of freedom of the press[71] and confidential informants are a principal source of newsworthy information, a grand jury requirement that reporters divulge the identity of their informants seems clearly to place a "direct" burden on newsgathering. If, however, the focus is on the grand jury as a legitimate arm of government authorized to uncover criminal activity, then the burden which a subpoena imposes on a reporter seems at worst "indirect" or "incidental." Presumably, Justice Black would have opted for the latter approach and thus have favored application of some type of balancing test rather than the absolute privilege which Justice Douglas supports in cases of the *Branzburg* genre, but Justice Black's direct-indirect dichotomy does not appear to provide much guidance in such cases.

Kleindienst v. Mandel[72] also bears mention. A divided Court, speaking through Justice Blackmun, upheld the Attorney General's refusal to waive visa ineligibility for Ernest Mandel, a Belgian journalist and Marxist theoretician who had been invited to the United States to participate in a series of academic conferences. According to the government, waiver was refused because Mandel had engaged in activities beyond the stated purposes of his visits on previous trips to the United States. In view of the plenary character of governmental power over the exclusion of aliens, this "facially legitimate and bona fide"[73] ground for the Attorney General's action was sufficient, in the majority's judgment, to justify any burden which the denial of waiver had placed on the first amendment rights of the American university professors who had joined Mandel in his suit against the government. Since under federal law Mandel was ineligible for a visa because he was an advocate of communist doctrine, there is little doubt that Justice Black would have viewed the case as involving a direct abridgment of Mandel's first amendment rights or those of his intended American audience. Had Mandel's ineligibility rested on constitutionally valid grounds, however, Justice Black's direct-indirect distinctions would have provided little direction as to the nature of the burden involved in the case. Justice Black might

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[71] *But cf.* 45 MISS. L.J. 1064, 1065-72 (1974).

[72] 408 U.S. 753 (1972).

[73] *Id.* at 770.

well have considered the infringement on expression at issue in *Mandel* as simply an incidental consequence of a regulation clearly within the scope of legitimate governmental power. But the burden can just as easily be viewed as a direct restraint on the rights of would-be listeners.

Of recent Burger Court cases, *Pittsburgh Press Co. v. Human Relations Commission*[74] presents what would appear to be the most difficult first amendment issue for analysis from the perspective of Justice Black's direct-indirect dichotomy. In *Pittsburgh Press*, a five-four majority relied on the commercial speech exception to free speech in rejecting a first amendment attack on a local human relations commission order prohibiting newspapers from listing advertisements for jobs covered by an antisex-discrimination ordinance in sex-designated help-wanted columns. Obviously, the immediate and direct effect of the order was censorship of newspaper content. Also, however, sexually discriminatory advertisements are simply an incident of discrimination in employment practices—activities subject to state control. It is unclear, therefore, how Justice Black might have characterized the nature of the first amendment burden at issue in the case. Justice Black joined the Court's decision in *Valentine v. Chrestensen*,[75] the first case to recognize the commercial-speech exception to free expression, but so did Justice Douglas. Yet Justice Douglas later wrote Justice Frankfurter that *Valentine* was "an ill-advised opinion on a very important constitutional question,"[76] and in a *Pittsburgh Press* dissent reiterated his opposition to the *Valentine* rationale.[77] Especially in view of his absolutist conception of the first amendment, Justice Black, too, may have reversed his stance on commercial speech in the years after *Valentine* was decided. It is more likely that he would have viewed the commission order at issue in *Pittsburgh Press* as merely a part of valid governmental efforts to suppress an illegal course of conduct "in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[78]

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[74] 413 U.S. 376 (1973).

[75] 316 U.S. 52 (1942).

[76] Letter from Justice William O. Douglas to Justice Felix Frankfurter, Nov. 22, 1958, on file in the *Felix Frankfurter Papers*, Library of Congress.

[77] *See also* Justice Douglas' concurrence in Cammarano v. United States, 358 U.S. 498, 513 (1959).

[78] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (Black, J.). Apparently Justice Black would have supported the Court's use of a balancing approach in recent cases involving first amendment and equal protection challenges to statutes regulating party and independent candidate access to the ballot and voter changes in party membership. *E.g.*, American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Kusper v. Pontikes, 414 U.S. 51 (1974); Rosario v. Rockefeller, 410 U.S. 752 (1973). *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968) (Black, J.). Ordinarily in such cases, the Court has held that the regulations at issue are valid only if necessary to further

legitimate and "compelling" state interests which cannot be adequately served by means less restrictive of fundamental rights. *But see* Rosario v. Rockefeller, *supra*. In the *Williams* case, Justice Black employed compelling interest language in striking down on equal protection grounds the ballot regulations challenged there. Justice Black's use of compelling interest language in *Williams*, however, seems inconsistent with his normal approach in equal protection cases. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (Black, J., dissenting). When asked about this inconsistency, he replied: "Sometimes I have to use words to hold my Court." Interview with Justice Hugo L. Black in Washington, D.C., July 6, 1971.

In cases where otherwise valid regulations have been challenged as imposing an unconstitutional burden on religious practices, the Court has also employed a balancing approach. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961). Justice Black joined such decisions, so he apparently would not have objected to the Court's utilization of a balancing test to resolve Wisconsin v. Yoder, 406 U.S. 205 (1972), upholding free exercise of religion claims raised by members of the Amish sect against compulsory education of their children beyond the eighth grade. Unfortunately, Justice Black never fully elaborated his thinking regarding the meaning of the free exercise guarantee. He did express vigorous opposition, however, to expanding "freedom of religion beyond religious beliefs," H. BLACK, *supra* note 4, at 45, and "religious speech," *Justice Black and First Amendment "Absolutes": A Public Interview, supra* note 4, at 559 (emphasis deleted). Presumably, therefore, he viewed regulations of religious practices as constituting indirect burdens on the first amendment and thus subject to the constitutional standards which he espoused in cases involving such regulations.

Speaking for a divided Court in Everson v. Board of Educ., 330 U.S. 1 (1947), Justice Black appeared to employ a variation of the direct-indirect approach in upholding governmental reimbursement of school bus fares to the parents of parochial school children. Any benefit accruing to parochial schools from such a program, he wrote, was an inconsequential and incidental by-product of "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18. Unlike Justice Douglas, *see, e.g.*, Engel v. Vitale, 370 U.S. 421, 443-44 (1962) (concurring), Justice Black never repudiated *Everson*. Indeed, Justice Frankfurter's suggestion that opinions filed in McCollum v. Board of Educ., 333 U.S. 203 (1948), decided in the term following *Everson*, make no mention of *Everson* produced a biting response from Justice Black:

> I will not agree to any opinion in the *McCollum* case which does not make reference to the *Everson* case. Time has confirmed my conviction that the decision in the *Everson* case was right . . . .

Memorandum for the Conference, Feb. 11, 1948, on file in the *Wiley B. Rutledge Papers*, Container 21, Yale Law Library. Moreover, Justice Black on occasion joined the Court in post-*Everson* cases upholding governmental policies which were defended as promoting secular objectives but which were also of obvious benefit to religion. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970); McGowan v. Maryland, 366 U.S. 420 (1961). After *Everson*, however, he consistently refused to condone aid to secular programs in parochial schools, *see, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (Douglas & Black, JJ., concurring); Board of Educ. v. Allen, 392 U.S. 236, 250 (1968), and church-related colleges, *see* Tilton v. Richardson, 403 U.S. 672, 689 (1971) (Douglas, Black & Marshall, JJ., dissenting in part). Thus, it is probable that he also would have rejected the various aid programs challenged before the Court since his death. *See, e.g.*, Sloan v. Lemon, 413 U.S. 825 (1973) (tuition reimbursement grants); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (tax credits; maintenance and repair); Hunt v. McNair, 413 U.S. 734 (1973) (tax arrangements); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973) (testing and record-keeping costs).

Of course, difficulties in applying Justice Black's formula to specific fact situations may stem more from his failure to have developed a clear definition of terms than from inherent weaknesses in the direct-indirect approach to first amendment issues. A close reading of Justice Black's opinions suggests that, in his view, the decision whether a governmental regulation imposed direct or indirect burdens on first amendment freedoms turned neither on the nature of the regulation's impact on expression nor on the governmental objectives which it was designed ultimately to serve. Rather, for Justice Black, the scope of the regulation seemed to be controlling. Thus, he placed within the category of indirect burdens (1) nondiscriminatory regulations of conduct subject to state control but closely involving protected activity (*e.g.*, picketing), and (2) regulations of the content of expression, where the regulation is part of a broader regulatory scheme designed to control an activity within state authority, and the expression involved is meaningless except as an integral part of the proscribed activity (*e.g.*, false advertising prohibited under legislation proscribing fraud against consumers).[79] Within the category of direct and absolutely forbidden burdens he placed (1) regulations impinging *only* upon activity within his interpretation of the first amendment, and (2) discriminatory regulations of conduct subject to state control but intertwined with protected activity—regulations presumed by their discriminatory character to be aimed at the protected elements rather than at the controllable conduct.[80] Viewed in this light, Justice Black's direct-indirect dichotomy provides a rough but workable guideline in first amendment cases. Had he set forth his views more clearly, the direct-indirect aspect of his first amendment jurisprudence would perhaps have been less vulnerable to attack.

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[79] Note, for example, his characterization of the placards carried by the pickets in *Giboney*:

> [T]he placards were to effectuate the purposes of an unlawful combination, and *their sole, unlawful immediate objective* was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers.

336 U.S. at 502 (emphasis added).

[80] Justice Black did hold, of course, that regulations directed ostensibly at conduct within state authority should be viewed as direct abridgments of the first amendment if "openly [or] *surreptitiously* aimed at speech . . . ." Konigsberg v. State Bar, 366 U.S. 36, 69 (1961) (dissenting) (emphasis added). This statement prompted the charge that his direct-indirect approach required inappropriate judicial investigations into governmental motive. In practice, however, Justice Black concluded that a regulation of speech-connected conduct was really aimed at expression and thus a direct abridgment of the first amendment only where the challenged regulation was framed or applied in a discriminatory manner. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 580-81 (1965) (Black, J., concurring and dissenting); *cf.* Adderley v. Florida, 385 U.S. 39, 46-48 (1966) (Black, J.).

III. The Exceptions to Free Speech

Commercial speech is not the only exception to free expression which has engaged the Burger Court's attention since Justice Black's death. The Court has decided numerous cases involving certain of the free speech exceptions first recognized by Justice Murphy in *Chaplinsky v. New Hampshire*,[81] including obscenity, libel, and fighting words. Before his death, Justice Black joined a decision upholding the constitutionality of postal regulations under which a householder could have his name taken off the mailing lists of mailers of erotic advertisements.[82] Given the distinctions which he drew between conduct and expression, he probably would not have objected to bans on "live" sexually oriented entertainment.[83] It is entirely conceivable, in fact, that he would have voted to uphold regulations denying juveniles access to "adult" theaters and bookstores on a showing that the regulations were designed to protect children from sexual deviants who might frequent such establishments. In the main, however, Justice Black was an outspoken critic of obscenity controls.[84] There can be little doubt, therefore, as to his response to recent developments on the Court in the obscenity field.

Citing the difficulties inherent in attempts to devise constitutionally valid obscenity tests and the institutional stress which obscenity litigation places on courts, Justices Brennan, Marshall, and Stewart have concluded that government may regulate the manner in which sexually oriented material is distributed, but may forbid only its distribution to juveniles and obtrusive exposure to nonconsenting adults.[85] Justice Black would have applauded this move toward his position—a move prompted in part perhaps by his vigorous dissents from the prevailing view. Moreover, he would have regarded the majority's "serious value" reformulation of the social value obscenity test in *Miller v. California*[86] as possessing essentially the same defects which he saw in

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[81] 315 U.S. 568 (1942).

[82] Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

[83] To date, the Supreme Court has not ruled on the constitutional status of such activities. However, the Court has apparently decided to resolve this issue. Doran v. Salem Inn, Inc., 43 U.S.L.W. 3403 (U.S. Jan. 20, 1975) (No. 74-337), *noting prob. juris. over* Salem Inn, Inc. v. Frank, 501 F.2d 18 (2d Cir. 1974).

[84] *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 476 (1966) (dissenting); Smith v. California, 361 U.S. 147, 155 (1959); H. Black, *supra* note 4, at 46-48.

[85] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, Stewart & Marshall, JJ., dissenting). Justice Brennan, of course, had been the original architect of the prurient interest, patent offensiveness, and social value obscenity tests. *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957). Justice Stewart in the past would have allowed governmental suppression only of "hard-core pornography." *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 499 (1966) (dissenting); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring).

[86] 413 U.S. 15 (1973), *analyzed in* Comment, *Miller v. California: A Mandate for New Obscentity Legislation*, 45 Miss. L.J. 435 (1974).

the "utterly without value" standard endorsed by the plurality in *Memoirs v. Massachusetts*.[87] And the "local" standards guideline which the majority advanced in *Miller* would have been no more acceptable to Justice Black than any other conception of "community standards" utilized to measure the prurient appeal and offensiveness of erotic material.[88] Before his death, Justice Black had made clear his sentiments about the Burger Court's continuing refusal[89] to extend beyond the confines of the home the right to possess obscene material first announced in *Stanley v. Georgia*.[90] In a dissent registered in a 1971 obscenity case, he acidly remarked: "[P]erhaps in the future [*Stanley*] will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room."[91] Nor, despite the lenient standards which he generally favored in search and seizure cases, would Justice Black have accepted the Burger Court's conclusion in a recent case[92] that an adversary hearing prior to seizure

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[87] 383 U.S. 413 (1966). Of the *Memoirs* plurality's social value standard, Justice Black said, *inter alia*: "This element seems to me to be as uncertain, if not even more uncertain, than is the unknown substance of the Milky Way." Ginzburg v. United States, 383 U.S. 463, 480 (1966) (dissenting).

[88] Of the concept of "community standards" Justice Black wrote in his *Ginzburg* dissent:

> Nothing that I see in any position adopted by a majority of the Court today and nothing that has been said in previous opinions of the Court leaves me with any kind of certainty as to whether the "community standards" referred to are world-wide, nation-wide, section-wide, state-wide, country-wide, precinct-wide or township-wide. But even if some definite areas were mentioned, who is capable of assessing "community standards" on such a subject?

383 U.S. at 479-80 (footnote omitted).

[89] *See* United States v. Orito, 413 U.S. 139 (1973); United States v. Twelve 200-Foot Reels, 413 U.S. 123 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971).

[90] 394 U.S. 557 (1969).

[91] United States v. Thirty-seven Photographs, 402 U.S. 363, 382 (1971).

[92] Heller v. New York, 413 U.S. 483 (1973). Justice Black would undoubtedly have joined the majority in overturning a number of recent obscenity convictions. *See, e.g.*, Vachon v. New Hampshire, 414 U.S. 478 (1974) (merchant sold 14-year-old girl a button inscribed "Copulation Not Masturbation"); Kois v. Wisconsin, 408 U.S. 229 (1972) (underground newspaper published erotic poem and pictures depicting nude couple embracing); Rabe v. Washington, 405 U.S. 313 (1972) (per curiam) (drive-in theatre manager exhibited erotic film on screen visible to motorists). He also would have joined the Court's decision, though not its application of the *Miller* formula, in Jenkins v. Georgia, 418 U.S. 153 (1974), overturning the conviction of a theatre manager who had exhibited the critically acclaimed film "Carnal Knowledge." He would have dissented, however, from the Court's application of the *Miller* standards in Hamling v. United States, 418 U.S. 87 (1974), decided on the same day as *Jenkins*, to uphold convictions under the federal obscenity statute for knowing distribution of an advertising brochure relating to an illustrated version of the report of the President's Commission on Obscenity and Pornography.

of an allegedly obscene film is unnecessary where the judge who signed the warrant authorizing seizure first viewed the entire film, the film was seized to be preserved as evidence in a criminal proceeding, and there was no claim that the seizure prohibited continuing exhibition of other prints.

There should be no doubt either as to his reaction to the Court's ruling in *Gertz v. Robert Welch, Inc.*[93] that a publisher or broadcaster of defamatory comments about a private individual's involvement in a public issue may not assert the *New York Times* "reckless or knowing falsehood" rule[94] as protection against liability for actual damages, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.' "[95] For Justice Black, the first and fourteenth amendments stood as an absolute bar against all libel actions.[96] Much more difficult to assess, however, is the way in which one of Justice Black's persuasions in the first amendment field might have resolved recent Burger Court cases involving the fighting words concept.

In *Broadrick v. Oklahoma*,[97] a 1973 case, a majority composed of Justice White and the Nixon appointees imposed what may prove to be a significant restriction on the reach of facial overbreadth analysis. Reasoning that statutes touching conduct within the penumbra of the first amendment are less likely to deter the exercise of protected freedoms than regulations of "pure speech," Justice White concluded that statutes regulating communicative conduct can be ruled facially overbroad only on a showing of "substantial overbreadth": "[P]articularly where conduct and not merely speech is involved, the overbreadth of a statute must not only be real, but substantial as well, judged in relation to [its] plainly legitimate sweep."[98] Despite his *Broadrick* stance, Justice White has helped to form a different majority in another line of cases in which the Court has employed overbreadth-vagueness principles, and a narrow reading of the fighting words exception to free speech, to overturn convictions arising from the use of scurrilous language in public places.

Typical of these cases are *Gooding v. Wilson*[99] and *Hess v.*

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[93] 418 U.S. 323 (1974), *analyzed in* Comment, *Adjusting the Defamation Standard*, 46 MISS. L.J. 279 (1975).

[94] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[95] 418 U.S. at 348.

[96] *See, e.g.*, Rosenbloom v. Metromedia, 403 U.S. 29, 57 (1971) (concurring); Curtis Publishing Co. v. Butts, 388 U.S. 130, 170 (1967) (concurring); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (concurring); *Justice Black and First Amendment "Absolutes": A Public Interview, supra* note 4, at 557.

[97] 413 U.S. 601 (1973). *See also* Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548 (1973).

[98] 413 U.S. at 615.

[99] 405 U.S. 518 (1972).

Indiana.[100] In *Gooding*, the Court reversed the scurrilous language conviction of Johnny Wilson. Wilson was one of a group of antiwar protesters who blocked the entrance of a military headquarters when military inductees attempted to enter. When officers tried to remove the demonstrators, Wilson told one officer: "White son of a bitch, I'll kill you" and "you son of a bitch, I'll choke you to death." To another, he said: "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." Later, he was convicted under a Georgia statute making it a misdemeanor for a person to revile another with "opprobrious words or abusive language" tending to cause a breach of the peace. Without pausing to consider whether Wilson's words might have been punishable under a narrowly and clearly drawn statute, the Court declared the law facially vague and overly broad, noting that dictionary definitions and earlier state court constructions of the statute had given the words "opprobrious" and "abusive" a greater reach than fighting words. In *Hess*, the Court summarily overturned the disorderly conduct conviction of Gregory Hess, a campus demonstrator who had told other participants in an antiwar rally, "We'll take the fucking street later," as a sheriff and his deputies attempted to clear a street of protesters obstructing vehicular traffic. Concluding that Hess' conviction had rested on his statement, the majority held that the critical word in the statement could not be viewed as obscene, a fighting word directed at a particular person or group, or an incitement of imminent, lawless action.

Justice Powell has generally voted with the majority in scurrilous language cases,[101] but his approach has differed from the prevailing position in a number of respects. He has urged greater restraint in the application of the vagueness-overbreadth doctrine in such cases.[102] Moreover, he would include within the *Chaplinsky* exception to free speech not merely fighting words likely to provoke immediate violent reaction, but also "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience."[103] The other Nixon appointees consistently favor affirmance of scurrilous language convictions and have registered a number of vehement dissents against the majority's stance. Where statutes invoked against offensive language have been ruled facially invalid, Chief Justice Burger and Justices

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[100] 414 U.S. 105 (1973) (per curiam). *See generally, e.g.*, Eaton v. City of Tulsa, 415 U.S. 697 (1974) (per curiam); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Plummer v. City of Columbus, 414 U.S. 2 (1973) (per curiam); Carson v. City of Columbus, 409 U.S. 1053 (1972); Brown v. Oklahoma, 408 U.S. 914 (1972) (mem.); Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (mem.). *See also* Norwell v. City of Cincinnati, 414 U.S. 14 (1973) (per curiam); Colten v. Kentucky, 407 U.S. 104 (1972).

[101] Neither Justice Powell nor Justice Rehnquist participated in the *Gooding* decision.

[102] *See, e.g.*, Rosenfeld v. New Jersey, 408 U.S. 901, 903 (1972) (Powell, J., dissenting).

[103] *Id.* at 905.

Blackmun and Rehnquist have charged the majority with usurping legislative prerogative and applying facial review standards in an "indiscriminate" and "abstract" manner which ignores

> the nature of the speech in question, the possible [deterrent] effect the statute or ordinance has upon such speech, the importance of the speech in relation to the exposition of ideas, [and] the purported or asserted community interest in preventing the speech.[104]

Where, as in *Hess*, the Court has ruled that offensive speech formed the basis for a challenged conviction and that the speech in question was subject to constitutional protection, the trio has accused the majority of improperly "substituting a different complex of factual inferences for [those] reached by" lower courts.[105]

The Chief Justice and Justices Blackmun and Rehnquist have complained, too, that the majority has attached a more restrictive meaning to the fighting words concept than that implicit in *Chaplinsky*, and they have stressed that "lewd," "profane," and "insulting" words—categories not yet subjected to narrowing judicial construction—are also included within the *Chaplinsky* exceptions to free speech.[106] Finally, they have warned that the majority's disposition of scurrilous language cases threatens the rule of law and encourages a return to the "law of the jungle."[107] Dissenting in *Gooding*, for example, Chief Justice Burger wrote: "There is no persuasive reason to wipe the [challenged] statute from the books, unless we want to encourage victims of such verbal assaults to seek their own private redress."[108]

A number of elements in Justice Black's first amendment record have a bearing on his probable response to first amendment claims raised in the scurrilous language cases. Justice Black, of course, joined the Court's disposition of *Chaplinsky*. In fact, on a draft of Justice Murphy's opinion in the case he wrote: "I agree and think you have shown much wisdom in deciding the case with such restraint."[109] Shortly before his death, however, Justice Black said that he had not fully formulated his first amendment views when *Chaplinsky* was decided,[110] and his absolutist philosophy and opinions in obscenity and libel cases indicate clearly that, whatever his views when *Chaplinsky* was written,

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[104] Lewis v. City of New Orleans, 415 U.S. 130, 136-37 (1974) (dissent).

[105] Hess v. Indiana, 414 U.S. 105, 109 (1973) (dissent). *See also* Eaton v. City of Tulsa, 415 U.S. 697, 701 (1974) (per curiam)(dissent).

[106] *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130, 136-37 (1974)(dissent). *See also* Papish v. Board of Curators, 410 U.S. 667, 671, 673 (1973)(dissents).

[107] Rosenfeld v. New Jersey, 408 U.S. 901, 902 (1972)(mem.).

[108] 405 U.S. at 530.

[109] The draft is on file in the *Frank Murphy Papers, supra* note 5, in Container 61.

[110] Interview with Justice Hugo L. Black, *supra* note 78.

Justice Black later rejected certain portions, at least, of Justice Murphy's assertion in the case that the first amendment excludes from its protection "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[111] Even so, it is possible to reconcile Justice Black's stance in *Chaplinsky* with his later first amendment pronouncements. *Chaplinsky* upheld a statute prohibiting verbal assaults with offensive, derisive, or annoying words, but the statute had been construed to reach only fighting words "likely to provoke the average person to retaliation"[112] and the case involved a face-to-face verbal assault. Indeed, at the time *Chaplinsky* was decided, Justice Jackson said of the case: "The Constitution does not include a right to brawl and that's about all that seems to be involved."[113] It seems clear, therefore, that despite the breadth of the language employed in Justice Murphy's opinion, the *Chaplinsky* Court was dealing solely with speech closely brigaded with imminent lawless conduct and with a statute authoritatively interpreted to reach only expression of that character.

Plainly, Justice Black viewed *Chaplinsky* in that narrow light. After his last term on the Court, for example, he explained that he had joined the Court in *Chaplinsky* because he saw the case as one in which the speech in question was merely part of a course of conduct.[114] His stance in *Cohen v. California*,[115] decided during his last term, is also instructive regarding the interpretation which he gave *Chaplinsky*. In *Cohen*, a forerunner of the *Gooding-Hess* line of cases, a divided Court reversed the breach-of-peace conviction of an antiwar protester who had worn a jacket bearing the words "Fuck the Draft" in the corridor of a courthouse. Speaking for the majority in the case, Justice Harlan held that, absent a "particularized and compelling reason," a state may not make "the simple public display" of expletives a criminal offense, and rejected claims that the word at issue constituted obscenity, a fighting word, an incitement to illegal action, or an invasion of the "substantial privacy interests" of a "captive audience." Justice Blackmun, joined by Justice Black and Chief Justice Burger, dissented, maintaining that "Cohen's absurd and immature antic . . . was mainly [controllable]

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[111] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[112] *Id.* at 574.

[113] Justice Jackson attached his comment to a draft of Justice Murphy's opinion, on file in the *Frank Murphy Papers, supra* note 5, in Container 61.

[114] Interview with Justice Hugo L. Black, *supra* note 78. *See also* Jamison v. Texas, 318 U.S. 413 (1943), where Justice Black acknowledged a state power to "punish conduct on the streets which is in violation of a valid law," and cited *Chaplinsky*. *Id.* at 416.

[115] 403 U.S. 15 (1971).

conduct and little speech" and characterizing the case as "well within the sphere of *Chaplinsky*."[116]

At least two other aspects of his constitutional thinking are relevant to an examination of Justice Black's first amendment jurisprudence from the perspective of the recent scurrilous language cases. First, on several occasions, Black questioned the propriety of facial review. In *Younger v. Harris*,[117] a 1971 decision reaffirming the Court's traditional reluctance to enjoin state enforcement of criminal statutes claimed to be unconstitutional, he wrote:

> Procedures for testing the constitutionality of a statute "on its face" . . . and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges . . . when such application of the statute would conflict with the Constitution. . . . But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before courts are called upon to enforce them. . . . [T]he task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary.[118]

Relevant also is his stance in another 1971 case, *Coates v. City of Cincinnati*.[119] The *Coates* Court held facially void for vagueness and overbreadth a city ordinance making it criminal for three or more persons to congregate in public and conduct themsleves in a manner annoying to passers-by. In a brief opinion, Justice Black recommended remand so that a clearer record could be developed with respect to the sort of annoying conduct at issue in the case. In defending his position, he wrote:

> [L]aws which broadly forbid conduct or activities which are protected by the Federal Constitution, such as, for instance, the discussion of political matters, are void on their face. . . . On the other hand, laws which plainly forbid conduct which is constitutionally within the power of the State to forbid but also restrict constitutionally protected conduct may be void either on their face or merely as applied in certain

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[116] *Id.* at 27.

[117] 401 U.S. 37 (1971).

[118] *Id.* at 52-53 (citations and footnotes omitted). For post-*Younger* cases involving federal declaratory and injunctive intervention in state judicial proceedings, see Allee v. Medrano, 416 U.S. 802 (1974); Steffel v. Thompson, 415 U.S. 452 (1974).

[119] 402 U.S. 611 (1971).

> instances. . . . [T]his is one of those numerous cases where the law could be held unconstitutional because it prohibits both conduct which the Constitution safeguards and conduct which the State may constitutionally punish. Thus, the First Amendment which forbids the State to abridge freedom of speech, would invalidate this city ordinance if it were used to punish the making of a political speech, even if that speech were to annoy other persons. In contrast, however, the ordinance could properly be applied to prohibit the gathering of persons in the mouths of alleys to annoy passersby by throwing rocks or by some other conduct not at all connected with speech. It is a matter of no little difficulty to determine when a law can be held void on its face and when such summary action is inappropriate.[120]

Justice Black also professed "substantial" agreement with Justice White's dissent in *Coates*, which argued that facial review is entirely inappropriate in cases involving regulations claimed to infringe communicative conduct rather than "pure speech."

Second, as his forceful dissent in *Feiner v. New York*[121] made clear, Justice Black vigorously rejected the view that "a lawful public speaker"—that is, a person who is speaking in a place where he has a right to speak—can be prohibited from speaking simply because his speech may be offensive to others. Along these same lines, he asserted that the unpopular speaker has a first amendment right to police protection: "[I]f, in the name of preserving order, [police] ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him."[122]

When examined in combination with his opinions in speech-plus and symbolic speech cases, these elements in Justice Black's thinking suggest the following inferences about his probable stance with respect to governmental authority over scurrilous speech: Given his absolutist philosophy and his obvious distaste for laws punishing offensive speech, it may be that the post-*Chaplinsky* Justice Black would have rejected as constitutionally deficient all laws aimed directly at fighting words. It is more likely, however, that Justice Black would have accepted as constitutional narrowly drawn statutes proscribing face-to-face verbal assaults on the theory that such speech, like "agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society,"[123] so closely involves conduct subject to control that government cannot realistically be expected to treat it as "pure speech" for regulatory purposes. Moreover, he probably would have ac-

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[120] *Id.* at 616-17 (citations omitted).

[121] 340 U.S. 315, 321 (1951).

[122] *Id.* at 326.

[123] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (Black, J.).

corded the government's position deference and would have favored curtailment of facial review in cases where a conviction rests on a breach-of-peace or related general regulatory statute, the defendant claims that the conviction was based solely on offensive language, yet the record indicates that the conviction could have rested on activities subject to regulation.[124]

Assuming that this depiction of Justice Black's position is accurate, how might he have responded to Burger Court cases of the *Gooding* and *Hess* genre? In *Gooding*, he might have agreed with the majority that the statute at issue, as written and construed, had a broader sweep than fighting words, but he might well have filed a separate opinion emphasizing that the words at issue in the case were fighting words subject to control under a properly drawn regulation. He might have assumed a similar stance in *Lewis v. City of New Orleans*.[125] At issue in *Lewis* was a city ordinance making it a crime "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty," as applied to a woman who began yelling and screaming at a policeman attempting to examine her husband's driver's license and who called the policeman a "god damned mother fucker police." As authoritatively construed, the ordinance clearly had a broader reach than fighting words. Had the woman been convicted under a narrowly drawn ordinance preventing interference with policemen in the performance of their duties, however, one of Justice Black's persuasion might have favored affirmance of the conviction. In *Plummer v. City of Columbus*,[126] he probably would have favored reversal on overbreadth grounds of a conviction based on a statute prohibiting verbal abuse with menacing, insulting, slanderous, or profane language. Very likely, however, he would have agreed that the expression at issue in the case could be punished under a narrow statute prohibiting intimidation and threats of physical abuse, for *Plummer* reversed the conviction of a cab driver whose response to a female fare's complaint that he had passed her destination had been, in the words of the trial court, "a series of absolutely vulgar, suggestive and abhorrent, sexually-oriented statements."

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[124] Presumably also, Justice Black would have subjected applications of such regulations and fighting words statutes to the balancing and alternative means standards which he endorsed in cases involving indirect burdens on speech.

[125] *Lewis* has been before the Supreme Court on two occasions. Initially, the Court summarily vacated the judgment of the lower court and remanded the case for reconsideration in light of *Cohen* and *Gooding*. Lewis v. City of New Orleans, 408 U.S. 913 (1972) (mem.). On the next trip to the Court, the ordinance under review was ruled facially invalid. Lewis v. City of New Orleans, 415 U.S. 130 (1973).

[126] 414 U.S. 2 (1973) (per curiam).

In *Rosenfeld v. New Jersey*[127] and *Brown v. Oklahoma*,[128] on the other hand, Justice Black might have favored reversal on both overbreadth grounds and the view that the words at issue constituted protected expression. The appellant in *Rosenfeld* was convicted under a statute prohibiting the utterance of loud and offensive or profane or indecent language in public places after he had addressed a school board meeting attended by about 150 people, including women and children, and during the course of his remarks had used the expletive "mother fuckers" to describe teachers, the school board, the town, and the nation. The appellant in *Brown*, a member of the Black Panther Party, was convicted for violation of a statute banning use of obscene or lascivious language in public places, or in the presence of females. During a question-and-answer session at a political gathering of men and women in a college chapel, he had referred to certain city policemen as "mother fucker fascist pig cops" and to a particular officer as a "black mother fucker pig." Since apparently neither *Rosenfeld* nor *Brown* involved the sort of face-to-face verbal assault of a particular person at issue in *Chaplinsky*, it is doubtful that Justice Black would have viewed the vulgarities involved in these cases as subject to governmental proscription. Moreover, as construed, the *Rosenfeld* statute reached not only fighting words but also words "likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer,"[129] and the *Brown* statute also had a broader reach than fighting words.

Justice Black might well have objected, however, to the Court's summary reversal of the disorderly conduct conviction reviewed in *Hess v. Indiana*.[130] Hess, it will be remembered, was a campus demonstrator who had uttered the words, "We'll take the fucking street later," as a sheriff and his deputies attempted to clear a street of protesters obstructing vehicular traffic. In a brief per curiam decision the majority concluded that Hess was being punished "only [for] spoken words"[131] subject to constitutional protection. But in a biting dissent, Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun, noted that the record of the case was "unusually colorless and devoid of life"[132] and complained that the Court had "fashioned its own version of events from a paper record, some 'uncontroverted evidence,' and a large measure of conjecture."[133] Emphasizing that Hess was one of a large group

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[127] 408 U.S. 901 (1972).
[128] 408 U.S. 914 (1972).
[129] State v. Profaci, 56 N.J. 346, 353, 266 A.2d 579, 584 (1970).
[130] 414 U.S. 105 (1973) (per curiam).
[131] *Id.* at 107.
[132] *Id.* at 109.
[133] *Id.* at 112.

of demonstrators who had ignored police directions to disperse and were being cleared from in front of a patrol car containing two arrested students, Justice Rehnquist asserted that there were "surely possible constructions of [Hess'] statement which would encompass more or less immediate and continuing action against the harassed police."[134] While one of Justice Black's persuasion would not have endorsed certain language in Justice Rehnquist's dissent, he might have viewed Hess' statement as simply an integral part of a course of conduct subject to state control. At the very least, he would have opposed *summary* disposition of the case.[135]

Justice Black might have assumed a somewhat similar position had he participated in the Burger Court's resolution of *Eaton v. City of Tulsa*.[136] *Eaton* summarily reversed the contempt conviction of a defendant who, on cross-examination, had used the expletive "chicken shit" in reference to an alleged assailant. Applying the imminent-danger standard traditionally employed in contempt-by-publication cases, the Court held: "This single isolated usage of street vernacular, not directed at the judge or any officer of the court, cannot constitutionally support the conviction of criminal contempt."[137] In dissent, however, Justice Rehnquist, again joined by the Chief Justice and Justice Blackmun, quoted from the record of the proceedings from which the contempt action developed in an attempt to show that Eaton had received fair notice that he was being cited for contempt not merely for his use of a crude expletive but for a "course of conduct which began with the use of the expletive and ended with discourteous remarks to the trial judge."[138] Eaton was convicted under an information which charged him with contempt "by his insolent behavior during court and in the presence of the [judge], to wit, by using the language 'chicken shit.'" Justice Black might have agreed with the majority's assertion that it would amount to a denial of due process to uphold Eaton's conviction for activities not specifically mentioned in the information.[139] Assuming no procedural defects in the case, however, he probably would have

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[134] *Id.* at 111.

[135] When examining *Hess* from the perspective of Justice Black's first amendment philosophy, note also the following observation from his dissenting opinion in Konigsberg v. State Bar, 366 U.S. 36, 64 (1961):

> I do not believe . . . that [the first amendment] would invalidate laws resting upon the premise that where speech is an integral part of unlawful conduct that is going on at the time, the speech can be used to illustrate, emphasize and establish the unlawful conduct.

[136] 415 U.S. 697 (1974) (per curiam).

[137] *Id.* at 698.

[138] *Id.* at 705.

[139] *See, e.g.*, Cole v. Arkansas, 333 U.S. 196 (1948).

voted to affirm. Such an approach would have been compatible with his view that the first amendment does not grant one the right to say whatever he wishes wherever he happens to be, for the excerpt from court records which Justice Rehnquist cited in dissent reveals that although the judge ordered Eaton to show cause why he should not be held in contempt immediately following utterance of the expletive mentioned in the information, Eaton thereafter engaged in a defiant exchange with the judge. As in *Hess*, moreover, Justice Black would at least have been expected to question the propriety of summary reversal.

This interpretation of Justice Black's probable response to the sort of scurrilous language issues which have confronted the Burger Court since his death is in no way intended to suggest that Justice Black would ever have countenanced suppression of speech simply because some people—or all people—might find the words offensive. He undoubtedly would have subscribed to Justice Powell's observation in *Rosenfeld* that "[o]ne of the hallmarks of a civilized society is the level and quality of discourse,"[140] and he might have agreed with his successor's complaints about "a [recent] disquieting deterioration in standards of taste and civility in speech."[141] But Justice Black would have vigorously opposed any interpretation of the first amendment which recognized a governmental authority to cleanse the public vocabulary, just as he personally "detested"[142] obscene material yet forcefully rejected obscenity controls as patently unconstitutional.[143] If Justice Black believed that narrowly drawn regulations of fighting words were constitutionally valid, his belief was based on the close proximity of such verbal fisticuffs—and the volatile atmosphere in which they are hurled—to conduct within the permissible scope of governmental authority.[144]

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[140] 408 U.S. at 909.

[141] *Id.*

[142] *Text of Historic TV Interview of Justice Black, supra* note 4, at 9.

[143] This writer well remembers Justice Black's graphic characterization of one film which he had attended with a relative at the relative's suggestion. The film contained strong language and several erotic scenes, but it had received at least a modicum of critical acclaim and apparently had not aroused the intense concern of censors or citizens groups. Nevertheless, Justice Black condemned it as "filthy," "coarse," and "vulgar." Interview with Justice Hugo L. Black, *supra* note 78. Fortunately, he was not willing to translate his personal tastes into constitutional mandates.

[144] The post-*Chaplinsky* Justice Black would not necessarily have voted to uphold convictions produced under circumstances identical to those involved in the *Chaplinsky* case. As noted previously, Justice Black once said that he had not fully formulated his first amendment views at the time *Chaplinsky* was decided; and a close reading of Justice Murphy's *Chaplinsky* opinion and the opinion of the New Hampshire Supreme Court in the case, State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754 (1941), suggests strong similarities between the *Chaplinsky* and *Feiner* fact patterns.

IV. The Public Forum

The first amendment is said to reflect "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[145] Since Justice Black's death, the Burger Court has decided a number of cases in which litigants have urged acceptance of an interpretation of the first amendment which would increase the opportunities for self-expression by individuals and groups who are presently denied meaningful access to the most significant channels of communication. These cases have been essentially of two types. In some, litigants have contended that the premises of shopping centers and related facilities which serve the public constitute "public forums" with first amendment obligations. In others, the argument has been advanced that in an era of increasingly concentrated control of the press, talk about "uninhibited, robust, and wide-open" public debate is meaningless unless the first amendment is construed to incorporate a right of access to the media.[146]

Speaking for the Court in *Marsh v. Alabama*,[147] a 1946 case, Justice Black employed a "public forum" or "public function" rationale in overturning the trespass conviction of a Jehovah's Witness who had attempted to distribute religious literature on the streets of Chickasaw, Alabama, a privately owned company town. In conference, Justice Black had labelled Chickasaw "a political subdivision" subject to the first amendment's commands.[148] In his *Marsh* opinion, he enlarged upon that view, stating that, except for the fact of private ownership, Chickasaw possessed "all the characteristics of any other American town."[149]

In a *Marsh* dissent, Justice Reed gave Justice Black's opinion a broad reading:

> What the present decision establishes as a principle is that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views.[150]

Dissenting in the 1968 case of *Food Employees Local 590 v. Logan Valley Plaza Inc.*,[151] however, Justice Black limited his *Marsh* rationale strictly to the case's facts. In *Logan Valley*, the majority relied on *Marsh* to

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[145] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[146] A right of access has also been advanced in scholarly articles. *See, e.g.*, Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

[147] 326 U.S. 501 (1946).

[148] *Frank Murphy Papers, supra* note 5, in Container 67.

[149] 326 U.S. at 502.

[150] *Id.* at 512.

[151] 391 U.S. 308 (1968).

invalidate an injunction which broadly prohibited nonemployee handbilling and peaceful picketing of a store in the Logan Valley Plaza, a shopping center which the Court characterized as the "functional equivalent" of a municipal business district. Justice Black's dissent emphasized the differences between a company town having "all the characteristics of any other American town" and the Logan Valley shopping center.

> There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town." Indeed, at the time this injunction was issued, there were only two stores on the property. Now there are supposed to be about 17, but they are all conceded to be "commercial establishments." The remainder of the property in the center has been laid out as a large parking lot with individually marked parking spaces provided for business customers.[152]

His conclusion: "All I can say is that this sounds like a very strange 'town' to me."[153] Under *Marsh*, he maintained, private property could be treated as public for first amendment purposes only when it had taken on all the attributes of a town. There was

> nothing in *Marsh* which indicates that if one [feature] is present, e.g., a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.[154]

Such an expansive constitutional interpretation would subvert "the concept of private ownership of property,"[155] which is also recognized in the Constitution.

It may be that the Justice who dissented in *Logan Valley* was a different man, philosophically, from the author of the Court's opinion in *Marsh*. Certainly, some of the language in his *Logan Valley* dissent resembles more closely Justice Reed's dissenting opinion in *Marsh* than his own majority opinion. Moreover, Justice Black did not appear to be limiting the "public forum" concept strictly to the company-town context when he observed in *Marsh*:

> Ownership [of property] does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[156]

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[152] *Id.* at 331 (footnote omitted).

[153] *Id.*

[154] *Id.* at 332.

[155] *Id.* at 330.

[156] 326 U.S. at 506.

On the other hand, as he forcefully demonstrated in his *Logan Valley* dissent, there is also much language in Justice Black's *Marsh* opinion limiting the "public forum" concept advanced in *Marsh* to the company-town setting. And it is also true, as noted previously, that in conference discussion of *Marsh*, Justice Black's willingness to subject Chickasaw, Alabama, to constitutional obligations seemed clearly to have been based on his view that Chickasaw was no different from any other political subdivision. Whatever the answer to such questions of doctrinal consistency, however, the interpretation which Justice Black gave *Marsh* in his *Logan Valley* dissent clearly influenced—or furnished support for—the Burger Court's decision in *Lloyd Corp. v. Tanner*.[157]

In *Lloyd*, a five-four majority composed of the Nixon appointees and Justice White, speaking through Justice Powell, reversed a federal district court's holding that a company's policy of banning handbill distribution from the interior mall area of Lloyd Center, a large shopping complex, infringed first and fourteenth amendment free expression guarantees. In ruling against the first amendment claims raised in the case, the majority purported merely to be limiting the *Logan Valley* precedent to its facts. The *Logan Valley* Court, Justice Powell observed, had limited the decision there to cases in which the expression at issue was directly related to shopping center activities and no adequate alternative means of communication were available. Since neither of these elements was present in *Lloyd*, the *Logan Valley* principle was inapplicable.

The relationship of proscribed first amendment activity to a shopping center's operations and the adequacy of alternative avenues of communication are obviously factors which are relevant to a determination of the reasonableness of governmental controls over expression in public places. But they have no bearing on whether ostensibly private activities or policies are sufficiently "public" to bring the Constitution into play—the threshold question in cases of the *Marsh, Logan Valley*, and *Lloyd* genre. Moreover, as Justice Marshall, author of the Court's opinion in *Logan Valley*, pointed out in his *Lloyd* dissent, "Lloyd Center [was] much more analogous to the company town in *Marsh* than was the Logan Valley Plaza,"[158] for Lloyd Center was larger, contained more commercial facilities, provided a wider range of professional and nonprofessional services, and, unlike Logan Valley Plaza, had a private police force with full municipal police powers. Yet the *Lloyd* majority seemed to be suggesting that Lloyd Center was free of the first amendment obligations imposed on the Logan Valley Plaza. It would appear, therefore, that the *Lloyd* majority was not merely limiting *Logan Valley*

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[157] 407 U.S. 551 (1972).

[158] *Id.* at 576.

to its facts, but was actually overruling sub silentio the principles established there and accepting instead the interpretation of *Marsh* set forth in Justice Black's *Logan Valley* dissent.[159]

The *Lloyd* decision was close, and in future cases first amendment obligations may be imposed on shopping centers and related facilities. For the present, however, it seems that the narrow reading which Justice Black gave the *Marsh* case in his *Logan Valley* dissent has become the prevailing view on the Burger Court.[160]

Since Justice Black's death, the Court has decided two cases involving claims of a first amendment right of access to the communications media. In the first case, *Columbia Broadcasting System Inc. v. Democratic National Committee*,[161] the majority was divided over the question whether the broadcaster policy at issue constituted governmental action for first amendment purposes, but held nevertheless that neither first amendment principles nor the congressional mandate that the Federal Communications Commission [FCC] act in the "public interest" required an FCC ruling that broadcasters accept paid editorial advertisements. In the principal opinion in the case, Chief Justice Burger concluded that requiring broadcasters to accept editorial advertisements would favor the affluent, jeopardize the FCC "fairness doctrine," undermine broadcaster accountability to the public, draw the FCC into

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[159] *See id.* at 562-64.

[160] Although the case was resolved on nonconstitutional grounds, Justice Black's stance in *Logan Valley* was also reflected in Justice Powell's opinion in Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), holding *Logan Valley* inapplicable to a dispute involving union solicitation in the parking lots of freestanding stores.

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), presented the Court with a public forum debate in a rather unique setting. At issue in *Lehman* was a city transit system policy which prohibited political advertising but permitted other types of advertising on city transit vehicles. Justice Blackmun, joined by the Chief Justice and Justices White and Rehnquist, concluded that card space on a city transit did not constitute a public forum subject to first and fourteenth amendment requirements. Casting the deciding vote in favor of the policy's constitutionality was Justice Douglas, who contended in a concurring opinion that no one has a right to force his political message on a captive audience which uses a public transit system only as a means of transportation. Justice Brennan, joined by Justices Stewart, Marshall, and Powell, filed a dissent in which he contended that the city had created a forum for the dissemination of ideas and thus could not discriminate among users of the forum solely on the basis of message content. What position Justice Black might have assumed had he participated in *Lehman* is difficult to assess. Given his acceptance of broad governmental authority over the uses of public property, he may have voted to uphold the challenged policy. On the other hand, he might have considered the policy a form of censorship forbidden by the first amendment. In the protest cases of the 1960's, he took the position that "if the streets of a town are open to some views, they must be open to all." Cox v. Louisiana, 379 U.S. 536, 580 (1965) (concurring and dissenting). He may have assumed a similar stance in *Lehman*.

[161] 412 U.S. 94 (1973).

"a continuing case-by-case determination of who should be heard and when,"[162] and conflict with "the reality that in a very real sense listeners and viewers constitute a 'captive audience'" whose interests in balanced coverage are entitled to protection.[163] Only Justices Brennan and Marshall dissented. In an extensive opinion which Justice Marshall joined, Justice Brennan complained that broadcasters did have first amendment obligations and charged that any legitimate interests served by an absolute broadcaster ban on editorial advertisements were outweighed by the first amendment interests in wide-open debate of public issues and in self-expression by individuals and groups through radio and television—public forums devoted exclusively to communication and the most significant modern avenue for the expression of ideas.

In the second case, *Miami Herald Publishing Co. v. Tornillo*,[164] a unanimous Court, speaking through the Chief Justice, declared Florida's "right to reply" statute unconstitutional and rejected claims to a limited right of access to the press. Under the statute, newspapers were required to provide free reply space to any political candidate wishing to respond to newspaper attacks on his personal character or political record. Chief Justice Burger equated such a requirement with prior restraints on publication. Rather than print critical material about a candidate and risk additional expense and demands on limited newspaper space, Chief Justice Burger observed, newspapers might simply resort to self-censorship. Moreover, he wrote, even if a newspaper would face neither additional costs nor the need to forego publication of news or opinion in seeking to comply with the statute's provisions, the statute would nevertheless unduly interfere with journalistic discretion regarding newspaper content and size. He concluded: "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[165]

Justice Black's opinions and off-the-bench writings are filled with expressions of support for a society committed to free and full discussion of public issues. In a number of cases he joined his colleagues in legitimizing restraints on press freedom designed to increase access to the channels of communication. In the Court's opinion in *Associated Press v. United States*,[166] upholding application of federal antitrust regulations against the press, he wrote:

> It would be strange indeed . . . if the grave concern for freedom of the

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[162] *Id.* at 127.
[163] *Id.*
[164] 418 U.S. 241 (1974).
[165] *Id.* at 256.
[166] 326 U.S. 1 (1945).

> press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[167]

Moreover, Justice Black joined the unanimous 1969 decision in *Red Lion Broadcasting Co. v. FCC*,[168] where the Court, appearing to endorse a limited right of access to the broadcast media, upheld an FCC order and regulations promulgated under the Commission's "fairness doctrine" requirement that radio and television broadcasters include discussion of public issues on their stations and provide fair coverage of each side on an issue. In an opinion for the *Red Lion* Court, Justice White emphasized that since broadcast frequencies are a scarce resource, given the present state of technological development in the broadcast field, those who hold broadcast licenses cannot be allowed to monopolize a frequency to the exclusion of others. Justice White also argued that the paramount first amendment right implicated in the case was not that of broadcasters, but rather "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences . . . ."[169] Justice Black filed no opinion in the case. It may be assumed that he concurred generally with Justice White's reasoning.

Language in certain of Justice Black's opinions in first amendment cases also reflects concern about free expression opportunities for those individuals and groups largely deprived of access to the more orthodox channels of communication. His opinion in *Martin v. City of Struthers*,[170] upholding a first amendment attack on a handbilling regu-

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[167] *Id.* at 20 (footnote omitted).
[168] 395 U.S. 367 (1969).
[169] *Id.* at 390.
[170] 319 U.S. 141 (1943).

lation, included his often-quoted remark: "Door-to-door distribution of circulars is essential to the poorly financed causes of little people."[171] Also relevant is his dissent in *Kovacs v. Cooper*.[172] The majority in *Kovacs* upheld an ordinance which they interpreted to ban the use of amplifier equipment emitting "loud and raucous" noises, but Justice Black construed the challenged ordinance as proscribing all amplifiers and characterized its provisions as constituting an "invidious prohibition against the dissemination of ideas by speaking."[173] Noting that the Court would never support such a ban on newspapers, radio, or motion pictures, he filed a strong defense of the free expression interests of those denied access to the orthodox media, in which he observed:

> There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse.[174]

Despite his votes and opinions in such cases, however, it is probably inaccurate to translate Justice Black's stance there into an endorsement of a first amendment right of access to the media. In *Associated Press*, Justice Black was expressing the Court's willingness to allow governmental regulation of wire-service business practices designed to violate the antitrust law. That the business practices at issue had the effect of impeding the free flow of news was simply a strong reason in Justice Black's mind for rejecting wire service claims that enforcement of antitrust regulations against the press infringed first amendment guarantees. His *Associated Press* opinion can in no way be construed as recognizing a right of media access; at most, it can be interpreted as support for governmental control of monopolistic interferences with the free flow of ideas. Nor can his vote in *Red Lion* be viewed as an endorsement of a right of access to the media. Justice Black may have found it difficult to apply his first amendment formula to the *Red Lion* context, and that difficulty may have accounted for his silence in the case. But one may conjecture that he joined the Court's *Red Lion* decision on the theory that Congress has power to control access to the airwaves just as it has

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[171] *Id.* at 146.
[172] 336 U.S. 77, 98 (1949) (Black, J., dissenting).
[173] *Id.* at 103.
[174] *Id.* at 102.

power to control access to all forms of public property within its authority; that access to the airwaves must of necessity be limited; that the fairness doctrine is a means whereby government can limit access to the airwaves yet enhance the opportunities for full discussion of public issues; and that any indirect burdens which the doctrine places on broadcasters' free expression are offset by the governmental interest in controlling use of broadcast frequencies, a scarce resource. His ultimate focus in *Red Lion*, in other words, was probably on the authority of government to impose indirect burdens on expression as a means of enhancing free discussion, and not on any right of individuals and groups to self-expression over the airwaves. One should not read too much either into the expressions of concern about free expression for "little people" contained in his opinions in *Martin* and *Kovacs*, among other cases. As his stance in *Adderley v. Florida*[175] and certain of the other protest cases of the 1960's makes clear, Justice Black refused to enlarge the first amendment's meaning beyond what he viewed as its proper scope simply as a means of broadening the free expression opportunities of those denied meaningful access to the dominant modes of communication.

If this interpretation of his stance in analogous cases is correct, it suggests that, had he participated, Justice Black would have joined the Burger Court's disposition of both the *Columbia Broadcasting System Inc.* case and *Tornillo*. He might have voted to uphold a congressional-FCC requirement that broadcasters accept editorial advertisements, but he probably would have rejected the view that either the government or the broadcaster has any constitutional obligation to establish such a policy. It seems obvious also that he would have considered the right-of-reply statute at issue in *Tornillo* a direct and absolutely forbidden infringement on first amendment freedoms. While he apparently accepted congressional authority to assure a balanced presentation of views over the airwaves, his acceptance seems clearly to have been bottomed on physical limitations with respect to the number of broadcast frequencies. No such special problems exist with regard to the newspaper industry, and Justice Black no doubt would have recognized no governmental authority to control newspaper content, at least where content was not an integral part of a course of conduct subject to regulation. As a policy matter, Justice Black may well have agreed with the suggestion that the answer to the problem of concentrated control of the press may lie with governmental policies which encourage establishment of additional media outlets.[176] It is unlikely, however, that he

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[175] 385 U.S. 39 (1966).

[176] *See, e.g.*, T. EMERSON, *supra* note 54, at 671.

recognized any first amendment obligation on the part of those in control of media facilities to turn a portion of their property over to others for purposes of expression.

V. The Environment of Expression

Several recent Burger Court decisions have involved an assertion of first amendment rights by persons occupying a special status in society, including civil servants, students, prison inmates, and military personnel.[177] In two 1973 cases, the Court upheld against vagueness and overbreadth challenges federal[178] and state[179] restrictions on the political activities of civil servants. *Healy v. James*[180] remanded for further hearings a case involving a state-supported college's refusal to grant campus recognition to a campus chapter of the Students for a Democratic Society [SDS]. Justice Powell, speaking for the Court, said that the organization's refusal to abide by reasonable campus rules would constitute a proper ground for nonrecognition, but that recognition could not be denied because of the campus group's relationship with the national SDS, disagreement with the group's philosophy, or a general, unsupported fear of disruption. In *Papish v. Board of Curators*,[181] a divided Court summarily ordered reinstatement of a university graduate student who had been suspended for campus distribution of a newspaper which contained a political cartoon depicting policemen raping the Statute of Liberty and the Goddess of Justice, and a headline story, entitled "Motherfucker Acquitted," which discussed the trial and acquittal of a member of an organization called "Up Against the Wall, Motherfucker." Refusing to recognize "a dual standard in the academic community with respect to the content of speech,"[182] the *Papish* majority held that neither the cartoon nor the story was obscene or otherwise unprotected.

In several cases involving first amendment claims of prison inmates, the Court struck down, as overly broad infringements on the free

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[177] In Perry v. Sindermann, 408 U.S. 593 (1972), the Court remanded for further hearings the case of a college instructor who claimed that the nonrenewal of his teaching contract had been based on his criticism of superiors. *See also* Board of Regents v. Roth, 408 U.S. 564 (1972). Since the first amendment claims raised in *Sindermann* are essentially unrelated to those to be treated in this section of the article, treatment of *Sindermann* is omitted from the discussion which follows.

[178] Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548 (1973). For a somewhat related case, see Arnett v. Kennedy, 416 U.S. 134 (1974).

[179] Broadrick v. Oklahoma, 413 U.S. 601 (1973).

[180] 408 U.S. 169 (1972).

[181] 410 U.S. 667 (1973) (per curiam).

[182] *Id.* at 671.

expression guarantees of persons wishing to correspond with inmates, state regulations providing for censorship of prisoner mail;[183] concluded that prisoner mail censorship regulations must be accompanied by minimum procedural safeguards;[184] and upheld against the first amendment claims of inmates and newsmen state[185] and federal[186] regulations forbidding news media interviews with specific individual prison inmates. Finally, in *Parker v. Levy*,[187] the Court reviewed facial overbreadth and vagueness claims raised against article 133 of the Uniform Code of Military Justice [UCMJ], which prohibits "conduct unbecoming an officer and gentleman," and article 134, which punishes, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces," including those not specifically mentioned in the Code. Speaking for a majority composed of the Nixon appointees and Justice White, Justice Rehnquist held that because of the "very significant differences between military law and civilian law and between the military community and the civilian community,"[188] military regulations are subjected to more lenient and flexible vagueness-overbreadth standards than ordinarily would be applied in first amendment cases. Under those standards, Justice Rehnquist maintained, the challenged articles were neither overly broad nor unduly vague.

While all the members of the present Court apparently subscribe to Justice Fortas' observation in *Tinker v. Des Moines Independent Community School District*[189] that first amendment rights must always be applied "in light of the special characteristics of the school environment,"[190] they have differed markedly regarding the application of that proposition in specific cases. The votes and opinions of Chief Justice Burger and Justices Blackmun and Rehnquist in the civil servant, student, inmate, and serviceman cases suggest their beliefs that controls over expression in each of these areas should be subjected to substantially more lenient standards of scrutiny than normally applied in first amendment cases. Concurring in the judgment in *Healy*, for example, Justice Rehnquist emphasized: "The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens."[191] And in *Papish*, Justice Rehnquist, joined by the

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[183] Procunier v. Martinez, 416 U.S. 396 (1974).

[184] *Id.*

[185] Pell v. Procunier, 417 U.S. 817 (1974).

[186] Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[187] 417 U.S. 733 (1974).

[188] *Id.* at 752.

[189] 393 U.S. 503 (1969).

[190] *Id.* at 506.

[191] 408 U.S. at 203. Note also the Chief Justice's concurrence in the case. *Id.* at 195.

Chief Justice and Justice Blackmun, filed vigorous dissents which proceeded along similar lines. The three Justices joined the Court in invalidating prisoner mail censorship regulations in *Procunier v. Martinez*,[192] but the regulations at issue, in the words of Justice Powell's majority opinion, were so sweeping in scope that they "fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship."[193] In the other cases involving first amendment rights in specialized environments, they have sided with the government.

Characteristically, Justices White and Stewart are difficult to categorize. Justice Stewart spoke for the majority in upholding the prohibitions on media interviews with specific inmates, contending that the prisoners involved had ample alternative means of communication available and that newsmen had no right of special access to information not shared generally by the public. But he usually has voted to uphold the first amendment claims of those occupying a special status in society and in *Levy* wrote an extensive dissent condemning as hopelessly vague and meaningless the UCMJ articles challenged there. Justice White, who authored the majority opinions in the recent cases[194] upholding restrictions on the political activities of civil servants, has been somewhat less responsive than Justice Stewart—but somewhat more responsive than the Chief Justice and Justices Blackmun and Rehnquist—to the first amendment and related claims of civil servants, students, prisoners, and military personnel. The same rough generalization may be made about Justice Powell. Justices Douglas, Brennan, and Marshall agree that the environment in which expression is uttered may be related to the reasonableness of governmental controls; but they have also consistently favored application of strict standards of scrutiny in cases involving the scope of governmental authority over expression in special environments and have invariably voted to uphold the first amendment claims at issue.

There can be no doubt about Justice Black's position regarding the federal restrictions on political activities by civil servants upheld by the Burger Court in 1973. When those same provisions were upheld by the Court in *United Public Workers v. Mitchell*,[195] he contended in dissent that they were "too broad, ambiguous, and uncertain in [their] consequences to be made the basis of removing deserving employees from

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See Comment, *Cook v. Hudson: The State's Interest in Integration Versus the First Amendment Rights of the Public Schoolteacher*, 45 MISS. L.J. 953 (1974).

[192] 416 U.S. 396 (1974).

[193] *Id.* at 415.

[194] Cases cited notes 178 & 179 *supra*.

[195] 330 U.S. 75 (1947).

their jobs."[196] Presumably, he would have have been equally critical of the state regulations recently affirmed by the Court.[197]

Justice Black's stance in *Tinker* provides some evidence of his position with respect to the free expression rights of students and teachers on school property. In *Tinker*, the Court declared that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[198] and held that freedom of expression in schools could be subjected only to "reasonable" regulations designed to prevent "substantial interference" with the educational process. In a vehement—and, some would say, unduly intemperate—rejoinder to the *Tinker* majority's reasoning, Justice Black asserted: "It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases."[199] The state, he contended, possesses broad authority to limit expression on school property to those matters within the scope of the school's functions —as determined by school authorities.

The approach which Justice Black advanced in his *Tinker* dissent does not mean that he would have rejected the Court's approach in either *Healy* or *Papish*. While he may have recognized general state power to forbid the establishment of student organizations on a public college campus or to require organizational compliance with campus rules, he would have opposed on censorship grounds a state assertion of power to recognize certain organizations and deny recognition to others solely on the basis of organizational philosophy. Similarly, although he may have accepted state authority to ban student publications and their distribution from state college campuses, he would have rejected the view that suppression can be based on content. Moreover, he would have

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[196] *Id.* at 110.

[197] *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973). When *Mitchell* was decided, Justice Black dissented without opinion in Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 146 (1947) (dissent), upholding restrictions on the political activities of certain state civil servants.

[198] 393 U.S. at 506.

[199] *Id.* at 522. Along these lines, he observed:

> The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. . . .
>
> . . . Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public.

Id. at 521-22.

subjected controls over expression in schools and colleges to the balancing and alternative-means standards which he always applied to "indirect" burdens on first amendment freedoms.

Justice Black might have adopted essentially the same approach with respect to the first amendment claims of prison inmates. He probably would have accepted a ban on prisoner interviews with media representatives, and he may have been willing to uphold an absolute ban on prisoner mail. But he most assuredly would have opposed the inmate mail censorship regulations recently voided by the Burger Court, for they authorized censorship of letters that "unduly complain" or "magnify grievances," included expression of "inflammatory political, racial, or religious, or other views," or contained matter deemed "defamatory" or "otherwise inappropriate."[200]

Justice Black's opinion in *Reid v. Covert*,[201] denying military courts-martial jurisdiction over civilian dependents or servicemen, suggests his probable stance with regard to the Court's resolution of *Parker v. Levy*. Speaking for a plurality in *Reid*, Justice Black, in explaining the need to limit the scope of military jurisdiction, noted that many military regulations were sweeping and vague,[202] and cited article 134, one of the UCMJ articles challenged in *Levy*, as an example.[203] It appears likely, therefore, that he would have agreed with the *Levy* dissenters that both article 133 and article 134 were unconstitutionally vague. Given his views about the power to control the uses of property and the time, place, and manner of expression generally, it also seems probable, however, that Justice Black would have accepted broad control over the expression of military personnel who are on military property or performing military duties. Certainly, he would have expressed no doubt about the authority of government, under properly drawn regulations, to prohibit a serviceman from urging other military personnel to disobey orders, the sort of expression at issue in *Levy*.

The ease with which Justice Black's formula can be applied in cases involving the first amendment claims of persons occupying a special status in society varies, of course, with the situation. When one speaks of the first amendment rights of students or prison inmates, the focus normally is on the scope of their rights on particular public property. Thus, one of Justice Black's persuasion can easily conceptualize even-handed controls over the expression of students and prisoners as limitations on the uses of public property rather than as regulations of the content of expression, yet contend that in the "outside world" students

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[200] Procunier v. Martinez, 416 U.S. 396, 399-400 (1974).

[201] 354 U.S. 1 (1957).

[202] *Id.* at 38.

[203] *Id.* at 38 n.69.

and inmates enjoy the same first amendment rights to which all persons are entitled. Certain controls over the expression of civil servants and military personnel can be viewed simply as controls over the uses of property or the performance of official obligations, and Justice Black apparently would have supported broad governmental power to impose such regulations. As Justice Black forcefully asserted in his *Mitchell* dissent, however, there are obviously limits to the reach of a government employee's obligations to the state. Especially since government employee rights and obligations cannot necessarily be conceived of as limited to a particular spatial context (*e.g.*, prison or school property), articulating these limits and applying them in specific cases presents problems of substantial difficulty.

Conclusion

To date, it would appear, Justice Black's absence has had little impact on Burger Court decisional trends in the first amendment field. Without his absence, of course, the *Miller* reformulation of obscenity standards would not have occurred, and in certain other decisional areas his presence undoubtedly would have altered the outcome. In most cases, however, Justice Black's participation at most would simply have enlarged the number of majority or dissenting Justices on an issue. Moreover, he very likely would have supported a number of the recent major doctrinal developments on the Court, including the Court's curtailment of facial overbreadth review in communicative conduct cases and its restrictions on the scope of the public forum concept.

Even so, Justice Black's death has left a major void on the Court. During his judicial career, Justice Black spoke forcefully of the need to adhere absolutely to the first amendment's "literal" commands. Toward the end of his career, however, decisional trends in the speech-plus and symbolic speech fields, and in certain non-first amendment areas as well, prompted Justice Black also to emphasize what he saw as limits to the scope of civil liberties guarantees under the United States Constitution. Since Justice Black's death, Justice Douglas has continued to support a form of first amendment absolutism and his opinions defending a broad construction of certain constitutional guarantees have included themes once prominent in Justice Black's opinions.[204] No member of the present Court, however, seems concerned about the definitional limits to the scope of the first amendment and other civil liberties guarantees which Justice Black's opinions stressed. In the 1973 abortion

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[204] *See, e.g.*, his dissent in Gertz v. Robert Welch, Inc., 418 U.S. 323, 355 (1974), and his concurrence in another recent libel case, Letter Carriers v. Austin, 418 U.S. 264, 287 (1974).

case, *Roe v. Wade*,[205] for example, neither of the dissenting Justices raised the sort of broad objections to the substantive due process basis for the Court's decision which Justice Black surely would have registered; they simply favored application of a more lenient substantive due process standard than that contained in Justice Blackmun's majority opinion. Similarly, while the Justices differ over the scope of permissible governmental authority in the speech-plus and symbolic speech fields, none has charged, as Justice Black did, that these forms of expression lack direct first amendment protection. Justice Black's views regarding definitional limits to the scope of constitutional liberties were as important as his eloquent defense of absolute protection for first amendment freedoms. It is unfortunate that, with his death, those views have largely been silenced on the Burger Court.

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[205] 410 U.S. 113 (1973). *See also* Doe v. Bolton, 410 U.S. 179 (1973).

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COMMENTS

THE ELEVENTH AMENDMENT AND AWARDS OF ATTORNEYS' FEES AGAINST STATES AFTER *EDELMAN V. JORDAN*

Since *Edelman v. Jordan*,[1] the federal courts have been divided on the question whether an award of attorneys' fees can be made against a state. The resolution of this question will determine whether public-interest litigation against states will continue on its present scale; for without the possibility of reimbursement, the cost of such litigation[2] is certain to deter plaintiffs from bringing suit.

I. The Eleventh Amendment Background

A. In General

The eleventh amendment of the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Literal reliance on the language of the amendment would be misleading; it can be understood only in its historical context.[3]

During the national debate preceding ratification of the Constitution, fears were expressed that the expansive grant of judicial power in article III would subject states to suit without consent in the federal courts. Although there is nothing in the article to preclude such an interpretation, the drafters argued that this interpretation was unwarranted.[4] They were shortly to be proved wrong; for in 1793 the Supreme Court held, in *Chisholm v. Georgia*,[5] that the judicial power extended

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[1] 415 U.S. 651 (1974).

[2] More than 10 years ago, it was estimated that the average attorney's fee in a civil rights suit, including trial in the district court, appeal to the circuit court, and petition for certiorari, was between $15,000 and $18,000. 110 Cong. Rec. 6541 (1964) (remarks of Senator Humphrey).

[3] The events leading to the adoption of the amendment and the interpretation of the amendment in view of its history are discussed in Cullison, *Interpretation of the Eleventh Amendment*, 5 Houston L. Rev. 1 (1967); Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 Ga. L. Rev. 207 (1968).

[4] Chronicles of the Virginia Convention, 3 Elliot's Debates 533 (J. Madison), 555 (J. Marshall); The Federalist No. 81, at 508-09 (H. Lodge ed. 1888) (A. Hamilton).

[5] 2 U.S. (2 Dall.) 419 (1793).

to suits brought against a state by a citizen of another state.

Chisholm created a furor that resulted in the adoption of the eleventh amendment.[6] An appreciation of the causal relation between *Chisholm* and the amendment illuminates some of the interpretational vagaries of the amendment. Since the *Chisholm* opinion was based on an interpretation of the article III judicial power, it is not surprising that the amendment, in response, was phrased as a limitation on judicial power.[7] The amendment, however, has been interpreted not as limiting the judicial power, but as embodying the doctrine of sovereign immunity. The distinction becomes apparent (and significant) in the cases holding that the amendment can be waived;[8] a limitation on judicial power could not be waived.

The language forbidding suits brought "by Citizens of another state, or by Citizens or Subjects of any Foreign State" also cannot be taken literally; this phrasing, too, is directly attributable to *Chisholm*, where the plaintiff was a citizen of another state. But soon after adoption of the amendment, the Supreme Court held, in *Hans v. Louisiana*,[9] that a state is not subject to suit by its own citizens in federal courts. The Court did not specifically hold that such suits were forbidden by the eleventh amendment. Instead it reasoned, contrary to its holding in *Chisholm*,[10] that article III did not authorize suits in federal courts against unconsenting states[11] and that the eleventh amendment could not be interpreted to authorize such suits when brought by citizens merely because the amendment failed to mention that class of plaintiffs. Taken at face value, the reasoning of *Hans* means that the immunity of a state from suits brought by its own citizens is not of constitutional stature; rather it is based on common law principles of sovereignty and is therefore subject to judicial and legislative modification. The trend

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[6] The reaction is discussed in Hans v. Louisiana, 134 U.S. 1, 11 (1890); Mathis, *supra* note 3, at 224-28.

[7] Professor Cullison has argued that *Chisholm* is correct in holding the judicial power to extend to suits brought against states. He believes the error of the Court lay in confusing this jurisdictional issue with the question whether the states surrendered their sovereign immunity in adopting the Constitution. Cullison, *supra* note 3, at 14-15.

[8] *E.g.*, Clark v. Barnard, 108 U.S. 436 (1883).

[9] 134 U.S. 1 (1890).

[10] Compare the concurrence of Justice Harlan in *Hans*. *Id.* at 21.

[11] That is, article III does not authorize suits against unconsenting states brought by individual plaintiffs. The article explicitly authorizes suits brought against a state by another state. And it has been held that the states, in adopting the Constitution, waived immunity from suits brought by the United States. United States v. Mississippi, 380 U.S. 128, 140-41 (1965); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Wyoming, 331 U.S. 440 (1947); United States v. West Virginia, 295 U.S. 463 (1935); United States v. Texas, 143 U.S. 621 (1892); Brennan v. Iowa, 494 F.2d 100 (8th Cir. 1974).

has been, however, to interpret the immunity as constitutional,[12] if necessary by invoking the "history and tradition"[13] of the eleventh amendment. The term "eleventh amendment immunity," as used herein, will therefore encompass the general principle of sovereign immunity.

The proscription of the amendment has been diluted in several ways. That the amendment did not preclude suits against lesser units of government, such as counties and municipalities, was once settled.[14] This would appear still to be the law,[15] although there are occasional opinions apparently oblivious of the distinction.[16] To be distinguished are suits against state organizations; in these cases the issue is whether the state is the real party in interest. To determine whether the organization is merely an "alter ego" of the state, several circumstances are considered,[17] the most important being whether ultimate liability will fall on the state. If so, the eleventh amendment will bar the suit;[18] if not (for example, when the organization has a source of revenue independent of the state treasury), the organization will not be deemed an alter ego of the state, and the eleventh amendment will not bar the suit.[19] Also serving to limit the effectiveness of the eleventh amendment bar is the willingness of courts to find it waived. The waiver need not be express; it can be found implicit in conduct.[20] But consent to suit in state court does not waive the eleventh amendment immunity to suit in federal court.[21]

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[12] *E.g.*, Rochester v. White, 503 F.2d 263 (3d Cir. 1974); Jordan v. Gilligan, 500 F.2d 701, 706 (6th Cir. 1974); Mobil Oil Corp. v. Kelley, 493 F.2d 784 (5th Cir. 1974); Rothstein v. Wyman, 467 F.2d 226, 236-38 (2d Cir. 1972); *see* Edelman v. Jordan, 415 U.S. 651 (1974). *See generally* Comment, *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331, 334-36 (1966).

[13] Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 284 (1973).

[14] Port of Seattle v. Oregon & W.R.R., 255 U.S. 56 (1921); Graham v. Folsom, 200 U.S. 248 (1906); Chicot County v. Sherwood, 148 U.S. 529 (1893); Lincoln County v. Luning, 133 U.S. 529 (1890); Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1868).

[15] Markham v. City of Newport News, 292 F.2d 711 (4th Cir. 1961); Maybanks v. Ingraham, 378 F. Supp. 913 (E.D. Pa. 1974).

[16] *E.g.*, Thompson v. Madison County Bd. of Educ., 496 F.2d 682 (5th Cir. 1974) (remanding for further argument on eleventh amendment in the light of *Edelman*); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957).

[17] George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177, 179-80 (1st Cir. 1974).

[18] *E.g.*, George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177 (1st Cir. 1974).

[19] *E.g.*, Harrison Constr. Co. v. Ohio Turnpike Comm'n, 272 F.2d 337 (6th Cir. 1959).

[20] Parden v. Terminal Ry., 377 U.S. 184 (1964); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[21] Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944).

Tentative suggestions have been advanced that the immunity of the eleventh amendment is circumscribed by other constitutional provisions. In *Parden v. Terminal Ry.*,[22] the Supreme Court held that employees could sue a state-owned railroad under the Federal Employers' Liability Act [FELA] because Congress had abrogated the states' immunity by enacting the FELA. Congress could do this, in spite of the eleventh amendment, because "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate Commerce."[23] The authoritativeness of this holding is undermined by the Court's refusal to rest its opinion solely thereon; the Court went on to find that Alabama had consented to the suit by continuing to operate the railroad after the enactment of the FELA.[24] It has also been suggested that the fourteenth amendment modified the eleventh so that states are no longer immune from suits alleging violation of the fourteenth amendment. This theory has had little support.[25]

Although it was early held that the eleventh amendment barred only those suits in which the state was named as a defendant,[26] this position was gradually abandoned.[27] Today it is well established that a suit brought against a state official in his official capacity is barred by the amendment.[28] Of course, the question then becomes: When is a suit against an official against him in his official capacity? The answer turns on the relief sought. If the official is sued to enjoin his enforcement of an unconstitutional statute, then he is not being sued in his official capacity; the suit is therefore not barred by the eleventh amendment. This is the principle of *Ex parte Young*.[29] The reasoning is as follows: Since the state cannot act in violation of the Constitution, the official,

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[22] 377 U.S. 184 (1964).

[23] *Id.* at 191.

[24] *Id.* at 192.

[25] The Supreme Court, in *Ex parte* Young, 209 U.S. 123, 149-50 (1908), assumed, although it did not decide, that the fourteenth amendment did not modify the eleventh. Justice Marshall has indicated that he views the question as an open one. Edelman v. Jordan, 415 U.S. 651, 694 n.2 (1974) (dissenting opinion, joined by Blackmun, J.). Judge McMillan of the District Court for the Eastern District of North Carolina has indicated that he views the fourteenth amendment as limiting the eleventh; although his argument is quite logical, he cites no authority in support of it. Hallmark Clinic v. North Carolina Dep't of Human Resources, 380 F. Supp. 1153, 1161 (E.D.N.C. 1974) (dissenting opinion).

[26] Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824).

[27] The retreat began in Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

[28] Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944); *In re* Ayers, 123 U.S. 443 (1887); Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3299 (U.S. Oct. 9, 1974) (No. 74-403); Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973); *see* Dugan v. Rank, 372 U.S. 609 (1963); Land v. Dollar, 330 U.S. 731 (1947).

[29] 209 U.S. 123 (1908).

in so acting, is acting not as the agent of the state but as an individual.[30] If damages are sought, however, different considerations apply.[31]

When an official is sued for damages, two related, but distinct, types of immunity may be involved. If he is sued in his official capacity, the suit is deemed to be against the state itself and will be barred by the eleventh amendment;[32] if he is sued in his individual capacity, the eleventh amendment will not bar the suit,[33] but recovery may be denied because the official, as an individual, is immune from liability under principles of substantive law.[34] It is therefore necessary in each case first to decide whether the official is being sued in his official capacity, in his individual capacity, or both; this decision will determine which, if either, immunity attaches.

In general, a damage suit against an official will be deemed to be against him in his official capacity (and therefore against the state) if the state is "the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."[35] The test generally announced is whether "the judgment sought would expend itself on the public treasury . . . ."[36] The test, of course, is circular: the suit will be deemed against the state if the judgment sought will come from the public treasury, but a judgment would come from the public treasury only if it were deemed to operate against the state. A clearer test, though of more limited applicability, holds that where the state has provided a comprehensive statutory scheme for recovery

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[30] The fiction is of course illogical. Young's actions were considered the actions of the state for purposes of deciding whether they violated the fourteenth amendment, which is applicable only to the actions of states. His actions were not considered the actions of the state for purposes of deciding whether the eleventh amendment forbade enjoining them. The illogic is discussed and defended in C. WRIGHT, LAW OF FEDERAL COURTS § 49 (2d ed. 1970).

[31] Frequently, both injunctive relief and damages are sought in the same suit. Such cases often contain statements that would baffle anyone not familiar with the *Ex parte Young* fiction. Witness the following sentences, taken from a recent federal district court opinion: "The Eleventh Amendment provides no immunity for defendants here . . . since the suit is clearly brought not against the State of Mississippi, but against two individuals . . . ." Jagnandon v. Giles, 379 F. Supp. 1178, 1183 (N.D. Miss. 1974). "The suit, although nominally against State University officials, is in reality against the State of Mississippi." *Id.* at 1188. The first sentence is from the portion of the opinion dealing with injunctive relief; the second is from the portion dealing with damages.

[32] Cases cited note 28 *supra*.

[33] Scheuer v. Rhodes, 416 U.S. 232 (1974).

[34] 2 F. HARPER & F. JAMES, LAW OF TORTS §§ 29.8-.10 (1956); W. PROSSER, LAW OF TORTS § 132 (4th ed. 1971).

[35] *In re* Ayers, 123 U.S. 443, 506 (1887).

[36] Jordan v. Gilligan, 500 F.2d 701, 705 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3299 (U.S. Oct. 9, 1974) (No. 74-403); *cf.* Land v. Dollar, 330 U.S. 731, 738 (1947).

against the official (*e.g.*, against a tax collector for a refund), the procedure so provided is intended to stand in lieu of any right against the official as an individual; any suit nominally brought against the official under such a scheme is in fact against the state.[37]

But plaintiffs may also seek damages from officials as individuals. There they will encounter another immunity. Quite apart from the eleventh amendment, public officers enjoy common law immunity from liability for torts committed while performing public duties. The immunity is generally held to extend only to "discretionary" acts and not to "ministerial" acts,[38] although the distinction is often little more than characterization. And even if the act is discretionary, immunity can be lost if the official does not act in good faith.[39]

The primary vehicle for suit against state officials in federal court is 42 U.S.C. § 1983 (1970). The general principles already described are applicable to such suits. Most suits brought under the statute seem to be based on actions that would be characterized as discretionary.[40] Although the language of the statute imposing liabiliy is unqualified, the common law immunities have been held not to have been abrogated.[41]

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[37] Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944).

[38] W. PROSSER, *supra* note 34, § 132.

[39] Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); Hallmark Clinic v. North Carolina Dep't of Human Resources, 380 F. Supp. 1153 (E.D.N.C. 1974) (dictum); Westberry v. Fisher, 309 F. Supp. 12 (D. Me. 1970) (dictum).

It is generally held, however, that the immunity of judges is absolute, regardless of bad faith. Pierson v. Ray, 386 U.S. 547 (1967).

A further distinction is sometimes made, whereby immunity is lost if the official's acts are either beyond the scope of the powers granted to him or authorized by an unconstitutional statute. This distinction has been much criticized. 2 F. HARPER & F. JAMES, *supra* note 34, § 29.10; W. PROSSER, *supra* note 34, § 132. To confuse matters further, these criteria have been used to determine whether an officer is being sued in his official or individual capacity. *E.g.*, Dugan v. Rank, 372 U.S. 609, 621-22 (1963); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 702 (1949); Land v. Dollar, 330 U.S. 731, 738 (1947). Although the unconstitutional statute criterion is the crux of the *Ex parte Young* fiction, it may be doubted that it survives in damage suits. Pierson v. Ray, *supra* (holding police officers immune from damages for arrest made in good faith and with probable cause, even though statute unconstitutional).

[40] *E.g.*, Pierson v. Ray, 386 U.S. 547 (1967); Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3296 (U.S. Nov. 8, 1974) (No. 74-558); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); Hallmark Clinic v. North Carolina Dep't of Human Resources, 380 F. Supp. 1153 (E.D.N.C. 1974); Westberry v. Fisher, 309 F. Supp. 12 (D. Me. 1970).

[41] Pierson v. Ray, 386 U.S. 547, 554 (1967); Francis v. Davidson, 340 F. Supp. 351, 369 (D. Md.), *aff'd mem.*, 409 U.S. 904 (1972); Westberry v. Fisher, 309 F. Supp. 12 (D. Me. 1970).

B. Assessing Costs: Fairmont Creamery Co. v. Minnesota

In the cases discussed above in which the eleventh amendment was found not to prohibit suit, the sovereignty of the state was never expressly held to be limited; rather, it was found that the state had waived its immunity or that the suit was (though perhaps fictionally) against an official under the *Ex parte Young* principle. But there is another line of cases, more directly restricting the immunity for the limited purpose of assessing costs. Here the state is deemed to have lost some of its sovereign character.

The leading case is *Fairmont Creamery Co. v. Minnesota*.[42] The State of Minnesota argued that the eleventh amendment forbade taxing a state with costs incurred in litigation before the United States Supreme Court. The Court held otherwise:

> That the sovereign is not to be taxed with costs in either civil or criminal cases by rule of court without a statute is undoubtedly true. . . . But is the state to be regarded as the sovereign here? This Court is not a court created by the State of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such.
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> . . . .
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> The costs here incurred are in a litigation brought by writ of error into this Court to test the validity under the Federal Constitution of a statute of the state. The incidents of the hearing are those which attach to the regular jurisdiction of this Court. . . . We think that the rule, construed by long practice, justifies us in treating the state just as any other litigant and in imposing costs upon it as such . . . .[43]

Since the Court refers only to costs incurred in "this Court," the language could be interpreted narrowly as applying only to costs in the Supreme Court. Were *Fairmont Creamery* a case within the Supreme Court's original jurisdiction, this narrow reading would perhaps be logical; since *Fairmont Creamery* was in fact an appellate jurisdiction case, however, the narrow reading is questionable. Lower courts have held, apparently without question, that *Fairmont Creamery* permits the awarding of costs against states in any federal court.[44]

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[42] 275 U.S. 70 (1927).

[43] *Id.* at 73-77.

[44] Utah v. United States, 304 F.2d 23 (10th Cir.), *cert. denied*, 371 U.S. 826 (1962); United States *ex rel.* Griffin v. McMann, 310 F. Supp. 72, 74 (E.D.N.Y. 1970) (dictum); United States v. Crawford, 36 F.R.D. 174, 175 (W.D. La. 1964) (dictum), *aff'd in part,*

II. ATTORNEYS' FEES

A. In General

The American practice has generally been to require each litigant to pay his own way, in contrast to the English practice, which has generally sought to make the prevailing party whole.[45] Nowhere is this more evident than in the attitude toward attorneys' fees, which, at least until recently, were nearly always held in this country to be unrecoverable.[46] There are three theories, however, under which awards of attorneys' fees are sometimes made.[47]

The "bad faith" theory imposes the cost of attorneys' fees on a party who has obdurately litigated an issue on which he knew he would not prevail.[48] Since such litigants abuse the judicial system by attempting to deter an otherwise inevitable judgment by forcing the opposing party to pay dearly for it, it seems equitable that they be saddled with the costs which would not have been incurred had they not acted in bad faith. This theory was used by successful plaintiffs in school desegregation cases[49] but has been criticized as insufficiently broad.[50]

A second theory awards attorneys' fees when the plaintiff's suit

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rev'd in part sub nom. United States v. Clement, 358 F.2d 89 (5th Cir. 1966); Natural Gas & Oil Corp. v. Waggonner, 165 So. 2d 314 (La. Ct. App. 1964) (dictum). Professor Moore describes the awarding of costs against states as "firmly established" despite sovereign immunity claims. 6 J. MOORE, FEDERAL PRACTICE ¶ 54.76-1 (2d ed. 1972).

[45] 6 J. MOORE, *supra* note 44, ¶ 54.70[2]; 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2665 (1973); Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

[46] 10 C. WRIGHT & A. MILLER, *supra* note 45, § 2675.

The difference between American and English practice has been attributed to several factors. (1) Lawyers were held in low esteem (and even thought unnecessary) in colonial America. (2) Even in those states that at one time authorized the awarding of attorneys' fees according to fixed statutory amounts, the awards gradually became merely nominal (and supplementary to the actual charge made to the client) as years went by while legislatures left the fee schedules unamended. (3) The feeling has persisted that the American practice is more democratic. Goodhart, *supra* note 45, at 872-78.

[47] For a discussion of these theories, see Taylor v. Perini, 503 F.2d 899, 904-05 (6th Cir. 1974); Harrisburg Coalition Against Ruining the Environment v. Volpe, 381 F. Supp. 893, 896-97 (M.D. Pa. 1974); La Raza Unida v. Volpe, 57 F.R.D. 94, 96 (N.D. Cal. 1972).

[48] *E.g.*, Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) (alternative holding); 6 J. MOORE, *supra* note 44, ¶ 54.77[2]; 10 C. WRIGHT & A. MILLER, *supra* note 45, § 2675, at 192.

[49] *E.g.*, Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963).

[50] Clark v. Board of Educ., 369 F.2d 661 (8th Cir. 1966).

Judge Winter has suggested that since recent desegregation cases mandate immediate relief (rather than all deliberate speed), defendants in such cases should have the burden of explaining any delay; if the delay were insufficiently explained, the defendants would be charged with plaintiffs' attorneys' fees. Brewer v. School Bd., 456 F.2d 943, 952 (4th Cir.) (concurring opinion), *cert. denied*, 406 U.S. 933 (plaintiff's motion to vacate stay of mandate), 409 U.S. 892 (1972). This is simply an extension of the bad faith theory.

creates a "common fund" out of which the award can be taken.[51] According to the theory, the defendants do not actually bear the cost of attorneys' fees; rather, the awards to all subsequent plaintiffs will be reduced proportionately so that the fees are shared by all the plaintiffs.[52] Most appropriate in class actions, the theory has also been invoked when the suit results only in a stare decisis effect beneficial to a large group.[53] The theory has been extended to cases in which no direct financial benefit accrues to the plaintiffs,[54] so that in fact there is no fund; this has been justified as "a quasi-application of the 'common fund' doctrine."[55]

Finally, there are cases justifying awards of attorneys' fees on a "private attorney general" theory.[56] This is the theory best suited to awards made against state officials. The award is justified as an incentive to private plaintiffs to bring suits furthering strong congressional policy.[57] The leading case is *Newman v. Piggie Park Enterprises, Inc.*,[58] in which plaintiffs were seeking to enjoin racial discrimination by a restaurant. The United States Supreme Court noted that since no damages were recoverable, an award of attorneys' fees was particularly appropriate to

> encourage individuals injured by racial discrimination to seek judicial relief under Title II [of the Civil Rights Act of 1964].
>
> It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.[59]

Although the award in *Newman* was based on explicit congressional authorization,[60] the principle was extended by the lower courts to cover

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[51] 6 J. MOORE, *supra* note 44, ¶ 54.77[2]; 10 C. WRIGHT & A. MILLER, *supra* note 45, § 2675, at 185-88.

[52] Mills v. Electro Auto-Lite Co., 396 U.S. 375, 392-93 (1970).

[53] Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

[54] Mills v. Electro Auto-Lite Co., 396 U.S. 375 (1970) (setting aside merger because necessary proxies obtained by misleading statements).

[55] Brewer v. School Bd., 456 F.2d 943, 951 (4th Cir.), *cert. denied*, 406 U.S. 933 (plaintiff's motion to vacate stay of mandate), 409 U.S. 892 (1972) (finding indirect pecuniary benefit in free bus transportation ordered for plaintiff school children).

[56] 10 C. WRIGHT & A. MILLER, *supra* note 45, § 2675, at 188-92; Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 655-81 (1974).

[57] Of course, a threshold problem is to determine which congressional policies are "strong" enough to call for such awards. The problem is simple enough where Congress has provided for the award by legislation, but where Congress has not provided for such awards, it can be argued that courts, in making them, are indulging in judicial legislation. *See generally* Comment, *supra* note 56, at 655-81.

[58] 390 U.S. 400 (1968) (per curiam).

[59] *Id.* at 402 (footnote omitted).

[60] 42 U.S.C. § 2000a-3(b) (1970).

suits based on statutes not containing such authorization. At first the award was justified as particularly appropriate where there was no means of enforcement other than private suit,[61] but awards were soon made in suits brought under 42 U.S.C. § 1983 (1970)[62] even though that statute has a criminal counterpart in 18 U.S.C. § 242 (1970).[63]

B. Against States and State Officials

1. Before *Edelman*

Before the *Edelman* decision, the two leading cases on the recoverability of attorneys' fees against states and state officials were *Sims v. Amos*[64] and *Sincock v. Obara*.[65]

In *Sims*, the plaintiffs were seeking to recover from the legislators, governor, attorney general, and secretary of state of Alabama, attorneys' fees for a previous successful reapportionment suit[66] brought under 42 U.S.C. § 1983 (1970). The court held that the award of attorneys' fees was justified under the private attorney general theory and spoke to the eleventh amendment problem only in a footnote.[67] The court's analysis of the problem was rather summary, consisting of little more than a nod to the *Ex parte Young* fiction: just as sovereign immunity does not inure to the benefit of public officials sought to be enjoined from acting unconstitutionally, neither does it protect them from costs incident to injunction.[68] The court ignored what the Court of Appeals for the Fifth Circuit in a later, similar case[69] was to say "everyone knows," namely, that the officials "would be 'bailed out' by the State."[70]

Sims was affirmed summarily by the Supreme Court,[71] but in a

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[61] Lee v. Southern Home Sites Corp., 444 F.2d 143, 147 (5th Cir. 1971) (enforcing 42 U.S.C. § 1982 (1970)); *see* Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972) (42 U.S.C. § 1981 (1970)); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) (per curiam) (42 U.S.C. § 1982 (1970)).

Cooper also followed *Newman* in holding that the award was always to be made unless special circumstances rendered it unjust.

[62] *E.g.*, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) (alternative holding); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972).

[63] *See* Monroe v. Pape, 365 U.S. 167, 183-85 (1961).

[64] 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972).

[65] 320 F. Supp. 1098 (D. Del. 1970).

[66] Sims v. Amos, 336 F. Supp. 924 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972).

[67] 340 F. Supp. at 694 n.8.

[68] *Id.*

[69] Gates v. Collier, 489 F.2d 298 (5th Cir. 1973).

[70] *Id.* at 302 n.2.

[71] 409 U.S. 942 (1972).

slightly unusual manner, which is perhaps significant.[72] As reported in the advance sheets of the official reporter, the affirmance was only of the original reapportionment suit. When the bound volume appeared, the report revealed that both the original and the attorneys' fees cases had been affirmed.

Even though its reasoning may have been rather summary, *Sims* and its affirmance have been widely relied upon in other pre-*Edelman* attorneys' fees cases,[73] even when it was clear, in spite of *Ex parte Young*, that the state would ultimately bear the expense.[74]

Sincock v. Obara,[75] on the other hand, held that an award of attorneys' fees against state officials sued in their official capacity was prohibited by the eleventh amendment. The court viewed *Ex parte Young* as limited solely to injunctive relief; whenever money (whether termed damages or not) is sought, directly or indirectly, from the state, the eleventh amendment bars relief.

The *Sincock* court distinguished three cases[76] in which fees were awarded on the basis that in those cases the awards were supported by statute.[77] This basis for distinction is unsound.[78] If, as has been widely held[79] and, indeed, as the *Sincock* court itself held, the states' immunity from suit by their own citizens is constitutional, the statutes could hardly form a valid basis for an award.

The *Sincock* court also considered and dismissed *Fairmont Creamery* in one mysterious and erroneous sentence:

> In this case the Supreme Court by Mr. Chief Justice Taft held that a money judgment for costs could be imposed upon the United States

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[72] Jordan v. Gilligan, 500 F.2d 701, 706-07 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3299 (U.S. Oct. 9, 1974) (No. 74-403).

[73] *E.g.*, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

Indeed, in subsequent similar cases in the *Sims* district, the eleventh amendment argument has not been thought to merit mention. Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974); *accord*, Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972).

[74] Gates v. Collier, 489 F.2d 298, 302 n.2 (5th Cir. 1973); La Raza Unida v. Volpe, 57 F.R.D. 94, 101 n.11 (N.D. Cal. 1972).

[75] 320 F. Supp. 1098 (D. Del. 1970).

[76] Griffin v. County School Bd., 363 F.2d 206 (4th Cir.), *cert. denied*, 385 U.S. 960 (1966); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963); Pettaway v. County School Bd., 230 F. Supp. 480 (E.D. Va. 1964).

[77] 42 U.S.C. § 2000a-3(b) (1970).

[78] Though not given by the court, there is a valid basis for distinguishing the cases: all of them were brought against local government units. *See* text accompanying notes 14 & 15 *supra*.

[79] See notes 12 & 13 and accompanying text *supra*.

> [*sic*] and though there is provocative language in the opinion, we cannot find that it substantially aids [the plaintiff].[80]

Prior to *Edelman*, *Sincock* had not been followed by any other court.

2. *Edelman v. Jordan*

In *Edelman v. Jordan*,[81] the State of Illinois was administering its Aid to the Aged, Blind, or Disabled program in a manner that violated federal regulations. The Court of Appeals for the Seventh Circuit below had ordered state officials to administer the program consistently with the regulations and to pay the plaintiffs all benefits that had been wrongfully withheld. The Supreme Court reversed the order of backpayments.

The Court stressed that the distinction to be drawn from *Ex parte Young* was not between equitable relief and damages but between the prospective and retroactive effect of the decree.[82] The Court cited two earlier cases[83] in which its decrees undoubtedly affected state treasuries and distinguished them as follows:

> But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young* . . . .[84]

3. After *Edelman*

Edelman precipitated a rash of decisions in the lower courts denying attorneys' fees against state officials, but not all courts were swayed. In the Fifth Circuit, one panel, in the light of *Edelman*, remanded a case for a hearing on a demand for backpay, while at the same time directing

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[80] 320 F. Supp. at 1104 n.12. The judgment in *Fairmont Creamery* actually ran against the State of Minnesota. See note 43 and accompanying text *supra*.

[81] 415 U.S. 651 (1974).

[82] The Court cited two cases, *In re* Ayers, 123 U.S. 443 (1887), and Hagood v. Southern, 117 U.S. 52 (1886), in which it had refused equitable relief (specific performance) because of its effect on funds already accumulated by the state. 415 U.S. at 663-67.

[83] Graham v. Richardson, 403 U.S. 365 (1971) (prohibiting denial of welfare to aliens); Goldberg v. Kelly, 397 U.S. 254 (1970) (prohibiting termination of welfare without hearing).

[84] 415 U.S. at 667-68.

the district court on remand to award the plaintiffs reasonable attorneys' fees.[85] Another panel,[86] in *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*,[87] citing *Edelman*, held that since "any award for attorneys' fees must be paid from the federal revenues of the State of Texas"[88] the claim was barred.[89]

The Second Circuit has squarely held that awards of attorneys' fees are not barred by *Edelman*.[90] Relying in part on *Sims* and its affirmance, the court held that such an award

> as part of an order granting injunctive relief, has at most the "ancillary effect on the state treasury," which [*Edelman*] characterizes as "a permissible and often inevitable consequence of the principle announced in *Ex parte Young* . . . ."[91]

The court cited[92] several cases[93] awarding attorneys' fees and costs against states, apparently considering them to have survived *Edelman*.

The Second Circuit's reliance on the language quoted from *Edelman* is questionable. Although the court is perhaps correct in deeming an award of attorneys' fees a permissible ancillary effect on state treasuries authorized by *Ex parte Young*, the language cited, taken in context,[94] is doubtful authority; it was referring only to effects ancillary to *prospective* relief.

The Third Circuit has indicated that it interprets *Edelman* as precluding an award of attorneys' fees against states.[95] The court attributed

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[85] Thompson v. Madison County Bd. of Educ., 496 F.2d 682 (5th Cir. 1974); *see* Jagnandan v. Giles, 379 F. Supp. 1178 (N.D. Miss. 1974). *See also* Owens v. Roberts, 377 F. Supp. 45 (M.D. Fla. 1974).

[86] Judge Ainsworth sat on both panels and, though he concurred in Thompson v. Madison County Bd. of Educ., 496 F.2d 682 (5th Cir. 1974), wrote the opinion in Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017 (5th Cir. 1974).

[87] 496 F.2d 1017 (5th Cir. 1974).

[88] *Id.* at 1026.

[89] The conflict in the panels will soon be resolved. Petition for rehearing en banc was granted in *Named Members*. 496 F.2d at 1026. Arguments were heard Oct. 1, 1974.

[90] Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974); *accord*, Class v. Norton, 376 F. Supp. 503 (D. Conn. 1974).

[91] Jordan v. Fusari, 496 F.2d 646, 651 (2d Cir. 1974); *accord*, Taylor v. Perini, 503 F.2d 899, 906 (6th Cir. 1974) (Edwards, J., dissenting).

[92] Jordan v. Fusari, 496 F.2d 646, 651 n.11 (2d Cir. 1974).

[93] Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Gates v. Collier, 489 F.2d 298 (5th Cir. 1973); Utah v. United States, 304 F.2d 23 (10th Cir.), *cert. denied*, 371 U.S. 826 (1962); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972).

[94] See text accompanying note 84 *supra*.

[95] Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3296 (U.S. Nov. 8, 1974) (No. 74-558); *accord*, Harrisburg Coalition Against

to inadvertence *Edelman's* failure to overrule *Sims* explicitly.[96] Perhaps this attribution is correct, but against it must be noted *Edelman's* careful overruling of three other affirmances[97] that were just as summary as *Sims*. Furthermore, the Third Circuit did not deal with *Fairmont Creamery*, which *Edelman* likewise did not purport to overrule. While not conclusive on the issue of attorneys' fees, *Fairmont Creamery* is certainly relevant.

The Sixth Circuit, like the Fifth, had split between panels[98] but now appears to have resolved the issue, like the Third, by holding the eleventh amendment to bar attorneys' fees awards against states.[99] The court dealt with the problem extensively in *Jordan v. Gilligan*.[100] The district court had ordered the State of Ohio to pay plaintiffs' attorneys' fees incurred in a reapportionment suit brought under 42 U.S.C. § 1983 (1970). In reversing that order, the *Jordan* court stated that "[t]he rationale behind the doctrine of sovereign immunity is the protection of the states' fiscal integrity,"[101] and held that any attempt to reach funds in the state treasury is therefore barred by the amendment. The court attached little weight to the *Sims* decision, saying that summary affirmances are of little precedential value.[102]

Jordan distinguished *Fairmont Creamery* in three sentences:

> Although appellees urge that attorneys' fees are analogous to costs, the taxing of which is permitted against states, the test for determining whether a particular type of relief passes muster, as set out in *Edelman*, indicates the opposite. The Amendment bars any award which is "measured in terms of a monetary loss resulting from a past breach of a legal

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Ruining the Environment v. Volpe, 381 F. Supp. 893 (M.D. Pa. 1974) (alternative holding). *Contra*, Downs v. Department of Pub. Welfare, 43 U.S.L.W. 2270 (E.D. Pa. Dec. 20, 1974).

[96] Skehan v. Board of Trustees, 501 F.2d 31, 42 n.7 (3d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3296 (U.S. Nov. 8, 1974)(No. 74-558).

[97] Sterrett v. Mothers' & Children's Rights Organization, 409 U.S. 809 (1972), *aff'g mem.* Civil No. 70 F. 138 (N.D. Ind. April 14, 1972), *on remand from* Carpenter v. Sterrett, 405 U.S. 971 (1972) (mem.); State Dep't of Health & Rehabilitative Servs. v. Zarate, 407 U.S. 918 (1972), *aff'g mem.* 347 F. Supp. 1004 (S.D. Fla. 1971); Wyman v. Bowens, 397 U.S. 49 (1969), *aff'g per curiam* Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1968).

[98] Milburn v. Huecker, 500 F.2d 1279 (6th Cir. 1974) (indicating award should be made); Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3299 (U.S. Oct. 9, 1974) (No. 74-403) (denying award).

[99] Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974).

[100] 500 F.2d 701 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3299 (U.S. Oct. 9, 1974) (No. 74-403).

[101] 500 F.2d at 706.

[102] *Id.* at 706-07. *Contra*, Taylor v. Perini, 503 F.2d 899, 906, 907 (6th Cir. 1974) (Edwards, J., dissenting).

> duty on the part of the defendant state officials." *Edelman*, . . . [415 U.S. at 668]. In our opinion, awards of attorneys' fees fall within that classification and are, therefore, barred.[103]

The distinction drawn here by the court, however, is less than clear. Why are attorneys' fees deemed to be "measured in terms of . . . loss resulting from a past breach" while other costs are not? Both are incidents of the litigation itself, to be distinguished from damages. If it be argued that attorneys' fees are taxed against the state only when it loses and are in that manner contingent upon the state's having breached its duty, the rebuttal is that this is no less true of other costs, which are normally taxed against the losing party.[104] Perhaps the distinction is meant to turn on the practice of awarding attorneys' fees against parties who have litigated an issue in bad faith,[105] but there is abundant authority for making such awards on other grounds, even when the party against whom fees are taxed has litigated in good faith.[106]

Conclusion

Did *Edelman* overrule *Fairmont Creamery* sub silentio? *Edelman* illuminates the dichotomy between retroactive and prospective relief first developed in *Ex parte Young* and, in so doing, reaches the broad conclusion that any impairment of funds already in the state treasury is forbidden by the eleventh amendment. The conclusion is thus broad enough to undermine *Fairmont Creamery*, but the premises upon which the conclusion is grounded are not the same as those underlying *Fairmont Creamery*. *Fairmont Creamery* did not rest upon the *Ex parte Young* principle nor any other such distinction. The Court there clearly recognized that the costs were running against the state; it held simply that for purposes of taxing costs, the state was not to be regarded as sovereign, but was instead to be treated as any other litigant. *Fairmont Creamery*, then, would seem to lie outside the *Edelman* distinction: Its focus was not on the nature of the relief sought (retroactive or prospective) but on the nature of the state itself as a litigant (sovereign or nonsovereign). While this distinction between the cases may appear to be a bit too nice, it should be remembered that eleventh amendment interpretation is not an area to which such distinctions are foreign. Perhaps it is significant that the Second Circuit, which clearly distinguished prospective relief from retroactive relief in an opinion[107] that was

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[103] 500 F.2d at 709-10.

[104] Fed. R. Civ. P. 54(d).

[105] See text accompanying notes 48 through 50 *supra*.

[106] See text accompanying notes 51 through 62 *supra*.

[107] Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973).

quoted extensively with approval in *Edelman*,[108] continues to hold that attorneys' fees are not barred by the eleventh amendment.[109]

Perhaps the costs awarded in *Fairmont Creamery* are to be distinguished from attorneys' fees.[110] Certainly attorneys' fees are not normally included in awards of costs,[111] but it is difficult to perceive any distinction between costs and attorneys' fees for purposes of the eleventh amendment.[112]

Attorneys' fees are frequently awarded to a party who has sought to forward a policy which will benefit the public as a whole.[113] Frequently such suits take the form of suits to enjoin state officials from acting unconstitutionally. The state is required to defend such suits.[114] The expenses thereby incurred, including the cost to the state of its own attorneys, impair the funds of the treasury. Yet it has apparently never been argued that the eleventh amendment permits states to refuse to defend such suits with impunity. If the shield of the eleventh amendment does not extend to the costs of one side of the litigation, it seems not unreasonable to hold that the shield does not extend to the costs of the other side as well.

David Bishop Howorth

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[108] 415 U.S. at 664-65, 666 n.11.

[109] Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974).

[110] Jordan v. Gilligan, 500 F.2d 701, 709-10 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3299 (U.S. Oct. 9, 1974) (No. 74-403).

[111] 6 J. MOORE, *supra* note 44, ¶ 54.77[2]; 10 C. WRIGHT & A. MILLER, *supra* note 45, § 2675.

[112] *See* Taylor v. Perini, 503 F.2d 899, 906, 909 (6th Cir. 1974) (Edwards, J., dissenting).

[113] This policy underlies the private attorney general theory. See text accompanying notes 56 through 62 *supra*.

[114] That is, the state must either appear and defend or risk a default judgment.

TORT LIABILITY OF STATE MILITIA

Actions to recover damages occasioned by the acts or omissions of a state militia plunge the injured party into a quagmire of possible judicial and administrative remedies and their concomitant immunities. The problem is compounded by the peculiar federal-state duality accorded to the federally recognized units of the organized militia.[1] The courts have consistently denied recourse under the Federal Tort Claims Act [FTCA][2] holding without exception that members of the state militia who have not been called into federal service by the President are not employees of the United States within that Act.[3] As a result, judicial remedies have been limited almost exclusively to state courts.

I. Judicial Remedies: The Immunity Statutes

Judicial proceedings against the state are ineffectual. Some states have waived their immunity by enacting legislation similar to the FTCA,[4] but by and large, with respect to the state militia, sovereign immunity has been retained. In the wake of the Kent State tragedy, an Ohio appellate court attempted to abrogate the doctrine of sovereign immunity. The court urged a reinterpretation of certain state constitutional provisions and held that a distinction between the state and an individual as tortfeasors is arbitrary and capricious.[5] The Ohio Supreme

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[1] The National Guard is composed of federally recognized units of state militia supplied and equipped by the federal government. 32 U.S.C. §§ 106, 701-02 (1970). It comprises a part of the United States Ready Reserves. 10 U.S.C. §§ 261, 267 (1970). Every state also has provision for an inactive militia or state defense force that remains essentially dormant unless the National Guard is absent. For a complete discussion of the development and nature of the National Guard, see Shaw, *The Interrelationship of the United States Army and the National Guard*, 31 Military L. Rev. 39 (1966).

[2] 28 U.S.C. § 1346(b) (1970):

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[3] *E.g.*, Maryland *ex rel.* Levin v. United States, 381 U.S. 41 (1965); Blackwell v. United States, 321 F.2d 96 (5th Cir. 1963); Dover v. United States, 192 F.2d 431 (5th Cir. 1951); Williams v. United States, 189 F.2d 607 (10th Cir. 1951); Mackay v. United States, 88 F. Supp. 696 (D. Conn. 1949). *Contra*, O'Toole v. United States, 206 F.2d 912 (3d Cir. 1953) (District of Columbia National Guardsmen).

[4] *E.g.*, N.J. Stat. Ann. § 59:12-2 (Supp. 1973); N.Y. Ct. Cl. Act § 8-a (McKinney Supp. 1974).

[5] Krause v. State, 28 Ohio App. 2d 1, 3-5, 9-10, 274 N.E.2d 321, 323-24, 327 (1971).

Court, in reversing, declined to accept the lower court's construction of the Ohio constitution.[6]

Because of this immunity, a party seeking relief is forced to proceed against the individual member of the militia. It has been generally held that obedience to orders which are not manifestly illegal is a valid defense to the personal liability of subordinates.[7] While this rule continues to have relevance to federal troops and to the militia in a minority of states, the defense has been superseded by a statutory immunity conferred by the majority of American jurisdictions.[8]

Immunity statutes can be arranged into two broad categories. The primary grouping contains statutes purporting to prohibit civil actions against a member of the state militia for any acts or omissions while actively serving the state.[9] The more limited secondary category contains statutes providing a "qualified" immunity to militiamen involved in the suppression of riots and civil disorders, or serving during natural disasters.[10] Within these two categories there exists a variety of standards limiting the circumstances in which the particular statutes are operable. To what extent the statutes accomplish their professed purpose is an open question. The absolute immunity that many appear to confer poses a serious threat to the fourteenth amendment guarantee of due process.[11]

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[6] Krause v. State, 31 Ohio St. 2d 132, 135-43, 145-47, 285 N.E.2d 736, 739-43, 744-45 (1972).

[7] *See* Franks v. Smith, 142 Ky. 232, 134 S.W. 484 (1911); O'Shee v. Stafford, 122 La. 444, 47 So. 764 (1908); Herlihy v. Donohue, 52 Mont. 601, 161 P. 164 (1916); Commonwealth *ex rel.* Wadsworth v. Shortall, 206 Pa. 165, 55 A. 952 (1903); Hatfield v. Graham, 73 W. Va. 759, 81 S.E. 533 (1914). *But see* Allen v. Gardner, 182 N.C. 425, 109 S.E. 260 (1921); Manley v. State, 62 Tex. Crim. 392, 137 S.W. 1137 (1911). *See also* Annot., 135 A.L.R. 10 (1942).

[8] Only five states have no provision for militia immunity: Delaware, Montana, New Jersey, Pennsylvania, and Vermont.

[9] *E.g.*, MISS. CODE ANN. § 33-7-311 (1972):

> No member of the militia ordered into the active service of the state shall be liable civilly or criminally for any act done, or caused, ordered or directed to be done, by him in furtherance of and while in the performance of his military duty.

[10] *E.g.*, ARIZ. REV. STAT. ANN. § 26-159 (1956):

> A. The commanding officer of troops under arms while in actual service may cause such troops to perform such military duties as he requires. He may place under arrest an officer or enlisted man who disobeys orders of superior officers, and any person trespassing on parade or camp grounds or interrupting or molesting the orderly discharge of duty of troops under arms. The commanding officer shall use his own discretion with respect to attacking or firing upon a mob or unlawful assembly, and his honest and reasonable judgment in the exercise of his duty shall be a complete defense, both civilly and criminally, for any act done while on such duty.
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> . . . .

[11] Lobb, *Civil Authority Versus Military*, 3 MINN. L. REV. 105, 109 (1919).

While no immunity statute has ever been held unconstitutional on its face, courts have been zealous in limiting their application. The earliest construction of a militia immunity statute was by the Louisiana Supreme Court in 1908.[12] The statute conferred civil and criminal immunity upon militiamen ordered into active service of the state.[13] The court, in holding a commanding officer liable for an assault on one of the members of his company, said that "active service" contemplated only duty performed at the direct call of the governor; since the company had not been called to active service by the governor, the statutory immunity did not apply.[14] Another Louisiana court, in construing a similar statute[15] nearly one-half century later, denied immunity applying the same rationale.[16] Although other duties were required by this part of the code, the court said:

> This section absolves members of the National Guard from liability for their acts when they have been ordered by the Governor into active service in the event of insurrection, invasion, riot, or imminent danger thereof, or in the event of public disaster or danger from floods, fire, storm or earthquake, or to assist the civil authorities in guarding prisoners. It has no application otherwise to members of the National Guard, such as while on two weeks' training tour . . . .[17]

Similarly, a Missouri court held in 1953 that under a statute granting immunity to members of the Missouri State Guard "while engaged in and pursuant to the performance of lawfully ordered duties,"[18] an officer driving a military vehicle returning from maneuvers was not within the ambit of the statute.[19] In this case the court looked to the "underlying purpose" of the State Guard:

> [I]t is perfectly apparent that the underlying purpose of the Missouri National Guard and of the State Guard is to, when necessary, execute

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[12] State v. Josephson, 120 La. 433, 45 So. 381 (1908).

[13] No. 87, § 181, [1904] La. Laws 371.

[14] State v. Josephson, 120 La. 433, 45 So. 381 (1908).

[15] LA. REV. STAT. ANN. § 29:31 (West 1969):

> No officer or other member of the military forces of this state shall be indicted, prosecuted, or sued for any injury to any person or property performed or committed by him while in the active service of the State of Louisiana in the course of the business of the military forces of this State as required of him by this Part.

[16] Marler v. State, 78 So. 2d 26 (La. Ct. App. 1955).

[17] *Id.* at 35.

[18] § 4, [1943] Mo. Laws 646. This statute has undergone several revisions since 1953. The current version states that "no member of the organized militia in the active service of the state shall be liable . . . for [acts] done by him in the performance of his duty." MO. ANN. STAT. § 41.700 (Vernon 1959).

[19] Cotton v. Iowa Mut. Liab. Ins. Co., 260 S.W.2d 43, 46 (Mo. Ct. App. 1953).

> the laws, suppress insurrections, repel invasions and suppress lawlessness; all done in the interest of and for the protection of the public. None of these emergencies existed at the time certain members of the State Guard decided to hold maneuvers.[20]

Since the officer in question was not directly involved in any of those functions, the court reasoned that the statutory immunity did not apply.[21]

Only one decision has literally applied a broad immunity statute. The court, in granting immunity to the driver of a military truck which collided with a civilian vehicle, held that "active service" within the meaning of the statute contemplated military duty in or with a force of the organized militia on either full- or part-time duty status.[22] This interpretation of the statute was subsequently rejected by a federal court in the same jurisdiction.[23]

In effect, the cases construing grants of extremely broad immunity have narrowed their scope in precisely the same manner as legislative limitations requiring the existence of some public emergency. In denying immunity, the courts have also inquired into the scope of the orders under which the defendant acted,[24] the authority of the official issuing the orders,[25] and the rank of the defendant.[26]

Where the state has waived its own immunity but continues to assert the immunity of the individual militiaman,[27] at least one court has held that such immunity is valid and that the state replaced the individual as the real party in interest.[28] The same effect was obtained by the Wisconsin Supreme Court in 1973, which concluded that a statute requiring the state to pay any judgment entered against an individ-

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[20] *Id.* at 47.

[21] *Id.*

[22] Dorr v. Gibson, 208 Misc. 262, 145 N.Y.S.2d 48 (Sup. Ct. 1955).

[23] Boyer v. Chaloux, 288 F. Supp. 366 (N.D.N.Y. 1968).

[24] Manley v. State, 62 Tex. Crim. 392, 137 S.W. 1137 (1911).

[25] Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278 (1924).

[26] O'Shee v. Stafford, 122 La. 444, 47 So. 764 (1908).

[27] *E.g.*, N.Y. CT. CL. ACT § 8-a (McKinney Supp. 1974):

> 1. The state hereby waives its immunity from liability and action with respect to the torts of members of the organized militia and employees in the division of military and naval affairs of the executive department . . . .
>
> 2. The state shall save harmless and protect all members of the organized militia or an employee of the division of military and naval affairs from financial loss arising out of any claim, demand, suit or judgment by reason of the alleged negligence or other act of any such member or employee . . . .

See also N.H. REV. STAT. ANN. § 110-A:77 (1964) (broadens immunity of officers and enlisted men and prohibits recovery of damages from the state).

[28] Holt v. Rondeau, 105 N.H. 304, 199 A.2d 100 (1964); Leary v. McSwiney, 103 N.H. 85, 166 A.2d 118 (1960).

ual member of the militia was inconsistent with a provision granting a member of the militia immunity from suit; the state must have anticipated some circumstances under which an individual member of the militia would be liable or it would not have made provisions for responding in damages.[29] Analogously, the Louisiana Supreme Court reasoned in a 1908 case, *O'Shee v. Stafford*,[30] that a statute requiring the state to bear the expense of defending any suit brought against a member of the militia was inconsistent with a statutory grant of immunity.[31] The court noted that such a provision contemplated that an officer might be sued for actions done in his official capacity and that judgment might be rendered in the "ordinary manner."[32] Such reasoning with regard to the state bearing the cost of defense, if accepted, could have wide application because of the number of jurisdictions with similar provisions.[33]

In litigation resulting from the actions of the National Guard at Kent State, the Court of Appeals for the Sixth Circuit was asked in *Morgan v. Rhodes*[34] to consider the constitutionality of Ohio's "riot act" statute.[35] The court refused to hold the statute unconstitutional on its face, emphasizing the specific requirements imposed by its language:

> What this language purports to do is to grant immunity to policemen, firemen and members of the armed forces from prosecution for

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[29] Mazurek v. Skaar, 60 Wis. 2d 420, 210 N.W.2d 691, 693 (1973).

[30] 122 La. 444, 47 So. 764 (1908).

[31] 47 So. at 765.

[32] *Id.*

[33] Presently, 28 states provide for defending members of their militia from civil suits. *See, e.g.*, ALASKA STAT. § 26.05.140 (1962); MINN. STAT. ANN. § 192.29 (1962); MISS. CODE ANN. § 33-7-311 (1972).

[34] 456 F.2d 608 (6th Cir. 1972), *rev'd sub nom.* Gilligan v. Morgan, 413 U.S. 1 (1973). Suit was brought seeking an injunction against future deployment of the National Guard in similar situations because the training of the National Guard rendered it unsuitable for use as a riot control force. Declaratory judgment was also sought declaring OHIO REV. CODE ANN. § 2923.55 (Page Supp. 1972) invalid. The district court dismissed both counts. The court of appeals affirmed the dismissal on the question of the validity of section 2923.55 but remanded on the question of injunctive relief. The Supreme Court reversed, holding that the training of the National Guard was not a justiciable issue.

[35] OHIO REV. CODE ANN. § 2923.55 (Page Supp. 1972):

> Police officers, special police officers, sheriffs, deputy sheriffs, highway patrolmen, other law enforcement officers, members of the organized militia, members of the armed forces of the United States, and firemen, when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to section 2923.51 of the Revised Code, are guiltless for killing, maiming, or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend the rioters. This section does not relieve a member of the organized militia or armed forces of the United States from prosecution by court-martial for a military offense.

> killing, maiming or injuring a rioter during a riot "as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters." On its face before the immunity came into existence, this statute would seem to call for proofs that a riot existed, that there had been an order to desist and disperse which had been defied, and that force had been required to suppress the riot. The statute might be argued to grant immunity from prosecution as a result of the use of lethal force against "rioters" where the circumstances above were present; but this immunity would only come into being where the use of such lethal force was "necessary and proper." The necessary and proper language appears to us (as apparently it did to the District Judge) to be an approximation of the reasonable cause standard of the common law applicable to the use of fatal force.[36]

In *Krause v. Rhodes*,[37] involving subsequent litigation growing out of the same series of events, the same court was asked to rule on the applicability of another Ohio statute conferring immunity from civil suit to members of the organized militia in active service during a time of public danger.[38] Since the statute was in derogation of the common law and thus warranted strict construction, the court held that the provision

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[36] 456 F.2d at 614-15.

[37] 471 F.2d 430 (6th Cir. 1972), *rev'd sub nom.* Scheuer v. Rhodes, 416 U.S. 232 (1974).

[38] OHIO REV. CODE ANN. § 5923.37 (Page Supp. 1973):

> When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct.

Suit was brought by parents of students killed at Kent State University against the Governor, the president of the University, the adjutant general, the assistant adjutant general, and named and unnamed officers and enlisted men of the Ohio National Guard. The district court dismissed for lack of jurisdiction. The court of appeals affirmed. The Supreme Court reversed and remanded, noting that the district court and the court of appeals had erroneously accepted as a fact the good faith of the state officials and took judicial notice that mob rule existed at Kent State without providing the plaintiffs an opportunity to contest the facts assumed in that conclusion. The Court further noted that *Ex parte* Young, 209 U.S. 123 (1907), established that the eleventh amendment provides no shield to state officials charged with depriving another of a federal right under the color of state law:

> [P]etitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* for what they claim—but have not yet established by proof—was a deprivation of federal rights by these defendants under color of state law. Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure, are not barred by the Eleventh Amendment. Consequently, the District Court erred in dismissing the complaints for lack of jurisdiction.

416 U.S. at 238.

protected the guardsmen involved.[39] The court added that under the circumstances the statute in question had to be read in pari materia with the riot control act discussed earlier in *Morgan*.[40]

The plaintiffs in *Krause* sought recovery for damages resulting from the denial of civil rights under color of state law as prohibited by the Civil Rights Act, 42 U.S.C. § 1983 (1970), as well as damages under Ohio's wrongful death act.[41] The majority opinion did not address the question of recovery in the wrongful death claim, but held that suits against named officials were in fact suits against the state and were, therefore, barred by the eleventh amendment.[42] The court apparently confused statutory and executive immunity with sovereign immunity: "The Civil Rights Act, § 1983, cannot be engrafted on the Eleventh Amendment by judicial construction."[43] In affirming the statutory immunity of the National Guard members from suits brought under section 1983, the court produced an improbable result: The federal right to recover damages for the denial of civil rights under the color of state law was itself defeated under color of state law. Circuit Judge Celebrezze pointed this out in his elaborate and well-reasoned dissent:

> Indeed, the majority's ad hoc application of the Eleventh Amendment would appear to bar all suits under 42 U.S.C. § 1983, with its requirement that defendants thereunder be shown to have acted under color of state law.[44]

Judge Celebrezze also distinguished between the immunities available to the defendants in the suits under section 1983 and the claims for wrongful death. Since the wrongful death actions were governed by state law, the statutory immunity would apply if the defendants could bring themselves within the terms of the statute. In regard to the claims under section 1983, immunities provided by federal and general common law could be pleaded as defenses.[45] The Supreme Court, in reversing, noted that the complaint directly placed in issue whether the members of the National Guard acted in "good faith obedience to the orders of their superiors."[46] This, then, would seem to be the standard by which the liability of guardsmen in suits under section 1983 is to be measured. The outcome of the civil suits brought under section 1983 now pending against eight members of the Ohio National Guard involved in the Kent

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[39] 471 F.2d at 443.

[40] *Id.*

[41] Ohio Rev. Code Ann. §§ 2125.01-.04 (Page 1967), *as amended*, (Page Supp. 1973).

[42] 471 F.2d at 430.

[43] *Id.* at 443.

[44] *Id.* at 447-48.

[45] *Id.* at 457 n.2.

[46] 416 U.S. at 250. For a discussion of the Supreme Court reversal, see note 38 *supra*.

State incident[47] should further define what immunity the common law will bestow upon individual militiamen.

II. Administrative Remedies

All 50 states have adopted codes of military justice similar to or derived from the Uniform Code of Military Justice.[48] Those which have adopted the Uniform Code in toto include a provision based on 10 U.S.C. § 939 (1970), which provides for a board to be convened by the commanding officer upon the complaint of any person whose property has been damaged or wrongfully taken by members of the state military forces.[49] The board has the power to summon witnesses, to examine them under oath, and to receive depositions and other documentary evidence. The board's assessment of damages is subject to the approval of the convening authority. The satisfactory application of this provision to members and units of the National Guard is doubtful since the damages assessed are to be charged against the pay of the offender. The pay scale of the militiaman will not support recovery of any substantial damages. State administrative procedures are generally concerned with damages in the small claims category.

In 1960, in response to a proposal that the National Guard be brought within the purview of the FTCA,[50] Congress enacted the National Guard Claims Act [NGCA].[51] Under the NGCA the Secretary of

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[47] N.Y. Times, Nov. 9, 1974, § 1, at 1, col. 5 (city ed.).

[48] H. Moyer, Justice and the Military § 1-260 (1972).

[49] *E.g.*, Miss. Code Ann. § 33-13-609 (1972); Wash. Rev. Code Ann. § 38.38.856 (1964).

[50] H.R. Rep. No. 5435, 86th Cong., 2d Sess. (1960).

[51] 32 U.S.C. § 715 (1970), *as amended*, 32 U.S.C.A. § 715 (Supp. 1975):

> (a) Under such regulations as the Secretary of the Army or Secretary of the Air Force may prescribe, he or, subject to appeal to him, the Judge Advocate General of the armed force under his jurisdiction, if designated by him, may settle, and pay in an amount not more than $25,000 a claim against the United States for —
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> (1) damage to, or loss of, real property, including damage or loss incident to use and occupancy;
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> (2) damage to, or loss of, personal property, including property bailed to the United States or the National Guard and including registered or insured mail damaged, lost, or destroyed by a criminal act while in the possession of the National Guard; or
>
> (3) personal injury or death;
>
> either caused by a member of the Army National Guard or the Air National Guard, as the case may be, while engaged in training or duty under section 316, 502, 503, 504, or 505 of this title or any other provision of law for which he is entitled to pay under section 206 of title 37, or for which he has waived that pay, and acting within the scope of his employment; or otherwise incident to noncombat activities of the Army National

the Army or the Secretary of the Air Force is authorized to settle claims against the United States not in excess of $25,000.[52] The Act was apparently prompted by the federal government's appreciation of the National Guard's increasing role in the area of national defense, and a realization of the inadequacy of alternative remedies available in state courts.[53]

The NGCA is modeled after the Military Claims Act;[54] however, unlike the Military Claims Act, the NGCA permits no judicial recourse for the dissatisfied claimant: "Notwithstanding any other provision of law, the settlement of a claim under this section is final and conclusive."[55] Access to the courts under the FTCA[56] is contingent on the final disposition of the claim by a federal agency,[57] and since "settlement" in the terms of the NGCA includes total disallowance,[58] the disposition of the agency is conclusive.[59]

III. Extension of the Federal Tort Claims Act

Passage of the NGCA effectively curtailed litigation over the ques-

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Guard or the Air National Guard, as the case may be, under one of those sections.

(b) A claim may be allowed under subsection (a) only if —

(1) it is presented in writing within two years after it accrues, except that if the claim accrues in time of war or armed conflict or if such a war or armed conflict intervenes within two years after it accrues, and if good cause is shown, the claim may be presented not later than two years after the war or armed conflict is terminated;

(2) it is not covered by section 2734 of title 10 or section 2672 of title 28;

(3) it is not for personal injury or death of such a member or a person employed under section 709 of this title, whose injury or death is incident to his service;

(4) the damage to, or loss of, property, or the personal injury or death, was not caused wholly or partly by a negligent or wrongful act of the claimant, his agent, or his employee, or, if so caused, allowed only to the extent that the law of the place where the act or omission complained of occurred would permit recovery from a private individual under like circumstances; and

(5) it is substantiated as prescribed in regulations of the Secretary concerned.

. . . .

[52] 32 U.S.C.A. § 715 (Supp. 1975). A claim in excess of $25,000 may be certified to Congress by the Secretary of the appropriate military department.

[53] Betar & Finkelstein, *The National Guard Claims Act*, 24 Fed. B.J. 197, 198 (1964).

[54] 10 U.S.C. § 2733 (1970), *as amended*, 10 U.S.C.A. § 2733 (Supp. 1975).

[55] 32 U.S.C. § 715(g) (1970).

[56] *See* 28 U.S.C. § 1346(b) (1970).

[57] *Id.* § 2675.

[58] 32 U.S.C. § 715(h) (1970).

[59] Army Reg. 27-20, ¶ 6-3(b) (Jan. 1, 1971).

tion of federal employee status of National Guard personnel. Prior to its enactment, judicial claims against the United States for torts of the National Guard had developed two distinct lines of cases. The distinction was derived from the classification of the personnel involved. Where the individual tortfeasor was simply a member of the National Guard, the courts held without exception that he was not an employee of the government within the meaning of the FTCA.[60] Where the individual tortfeasor was a civilian technician or caretaker employee under 32 U.S.C. § 709 (1970),[61] the courts were unanimous in holding that such an employee was covered by the language of the FTCA.[62] Arguments on both sides of the controversy stressed the presence or absence of control exercised by the United States over personnel performing duties with the National Guard.

The NGCA, as originally enacted, included section 709 employees expressly,[63] effectively negating the judicial determination that such employees should be included within the scope of the FTCA.

The Supreme Court addressed the problem in *Maryland ex rel. Levin v. United States*,[64] approving the line of lower court decisions that denied government employee status to members of the National Guard and holding specifically that technician employees under section 709 are no longer to be considered employees of the United States. This opinion was essentially a retrospective appraisal since the cause of action had arisen prior to the passage of the NGCA.

Congress subsequently reversed itself with regard to the status of section 709 employees, amending that statute to specify that a person employed thereunder would be "an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States."[65]

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[60] Maryland *ex rel.* Levin v. United States, 381 U.S. 41 (1965); Blackwell v. United States, 321 F.2d 96 (5th Cir. 1963); Dover v. United States, 192 F.2d 431 (5th Cir. 1951); Williams v. United States, 189 F.2d 607 (10th Cir. 1951); Mackay v. United States, 88 F. Supp. 696 (D. Conn. 1949).

[61] Technicians are employed under section 709 to train and administer the National Guard and to maintain the equipment and material issued to the National Guard. Under most circumstances they are also required to be members of the state National Guard. Such employees are civilians, but they are required to wear military uniforms in the course of their employment. Regulations governing their employment are promulgated by the Secretary of the appropriate military department. They are paid entirely from federal funds. Their primary duty lies in the care and maintenance of the federally owned equipment issued to the National Guard.

[62] *E.g.*, Courtney v. United States, 230 F.2d 112 (2d Cir. 1956); Elmo v. United States, 197 F.2d 230 (5th Cir. 1952); United States v. Holly, 192 F.2d 221 (10th Cir. 1951); Leary v. United States, 186 F. Supp. 953 (D.N.H. 1960).

[63] 32 U.S.C. § 715 (1964).

[64] 381 U.S. 41 (1965).

[65] 32 U.S.C.A. § 709(d) (Supp. 1975).

Legislative acknowledgment of limited federal liability and the statutory extension of the FTCA to cover employees under section 709 reflect the heightened awareness of federal interest in the National Guard. That interest has increased steadily since the inception of the Guard, and the trend has not escaped notice by the courts. Specifically, in *United States ex rel. Gillett v. Dern*,[66] the Court of Appeals for the District of Columbia Circuit said:

> From all that appears above, it is clear that Congress, in carrying out its constitutional powers, had almost from the beginning provided by law for organizing, arming, and disciplining the militia, and that the process had been one of gradual enlargement, the United States assuming constantly increasing responsibility and exercising more and more control in organization and discipline . . . .[67]

Although this court went on to rule that an officer of the National Guard was an agent of the state rather than of the United States,[68] it seems clear that at some point federal control must become so pervasive that it supersedes that of the states. Recognizing this, the Court of Appeals for the Sixth Circuit held in *Krause v. Rhodes*[69] that the federal government was so inextricably involved with the training of the Ohio National Guard that it was an indispensable party to the suit. Failure to join the United States, therefore, required dismissal of the action.[70]

The contention of the federal government that the governor of a state in his role as commander-in-chief of the militia represents an intervening sovereignty in regard to federally recognized National Guard troops is illusory. With the exception of his ability to call troops into the active duty of the state to aid or augment civil authorities, a governor's role as commander-in-chief is analogous to that of any military commander. The state military departments are empowered to issue regulations to govern National Guard troops, but such regulations are invalid to the extent that they conflict with federal regulations issued by the federal military departments or the National Guard Bureau.[71] Training and discipline of National Guard troops must conform to that of the active armed services.[72] The familiar weekend drill and 15-day summer camp are requirements established by federal statute,[73] and the time spent at these exercises is employed almost exclusively in

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[66] 74 F.2d 485 (D.C. Cir. 1934).

[67] *Id.* at 487.

[68] *Id.*

[69] 471 F.2d 430 (6th Cir. 1972), *rev'd sub nom.* Scheuer v. Rhodes, 416 U.S. 232 (1974).

[70] 471 F.2d at 441.

[71] *Cf.* Stearns v. Wood, 236 U.S. 75 (1915). *See generally* Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972).

The federal preemption logic may be derived from the National Guard Act, 32 U.S.C. §§ 101-11 (1970).

[72] 32 U.S.C. § 501 (1970).

[73] *Id.* § 502 (Supp. III, 1973).

maintaining federal standards of proficiency. Annual inspections of Army National Guard units, also required by federal statute,[74] are implemented under Regular Army regulations[75] and conducted by Regular Army personnel.[76] Failure to meet federally required standards results in the loss of federal funds and equipment.[77]

Where the governor exercises his discretion and calls the National Guard into the active service of the state, the state is the director and the beneficiary of its efforts and should accept or deny liability on its own terms. But in training situations compelled by federal statute, the National Guard operates as any other military command of the United States and should be considered as such when the question of liability for its actions arises.

Under the rule of *Feres v. United States*,[78] a member of the military on active duty cannot recover damages from the United States under the FTCA for injuries received incident to active military service.[79] In *Layne v. United States*,[80] involving a wrongful death claim by the widow of a National Guard pilot killed on a duty training flight, the United States moved for summary judgment because the injuries were incident to the deceased's active service of the United States.[81] The Seventh Circuit affirmed the district court's action of granting the motion.[82] Similar results in later cases[83] produce an incongruous effect: The incidents of federal control over members of the National Guard are sufficient to deny liability but are insufficient to impose liability.

CONCLUSION

The statutory immunity conferred upon the individual member of

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[74] *Id.* § 105 (1970).

[75] Army Reg. 20-1 (May 24, 1972).

[76] 32 U.S.C. § 105 (1970).

[77] *Id.* § 108.

[78] 340 U.S. 135 (1950).

[79] *Id.* at 146.

[80] 295 F.2d 433 (7th Cir. 1961).

[81] *Id.*

[82] The court agreed with the district court's reasoning that

> "In this case, Major Layne at the time in question was performing limited service of the United States of America in a military status even though he was also executing at the same time the commands of the State of Indiana; . . . operated a jet plane of the United States of America and at the time in question had the direct duty to the United States of America to safeguard such plane even though he was executing at the same time the commands of the State of Indiana . . . ."
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> "Major Layne's accident occurred in the line of duty and incident to his service with the United States of America . . . ."

Id. at 435, *quoting* 190 F. Supp. 532, 537 (S.D. Ind. 1961).

[83] Herreman v. United States, 476 F.2d 234 (7th Cir. 1973); Coletta v. United States, 300 F. Supp. 19 (D.R.I. 1969).

the militia in the majority of jurisdictions is not nearly as broad as contemplated by the language of the various provisions. Courts have, for the most part, been careful to avoid the unconscionable results the statutes appear to impose. Since the *Scheuer v. Rhodes*[84] decision expressly provides for the abrogation of eleventh amendment immunity as a defense in suits brought against individual members of the National Guard, existing state immunity statutes will not continue to afford the protection intended.

An alternative method for protecting the militiaman would be for the state to accept liability for his actions. This could be accomplished either by a qualified waiver of sovereign immunity or by statutory provisions requiring the state to pay judgments rendered against the individual. An acceptance of liability by the state would also have the beneficial effect of protecting the citizen injured by the conduct of the militia.

The plight of the militiaman is not one to be envied. He is likely to be snatched from the routine of his civilian pursuits and thrust into a situation where the conflicting demands of civil and military law have puzzled the finest legal minds.

Aside from the possibility of their unconscionable application by the courts, unqualified immunity statutes are likely to produce two precarious effects. First, they may discourage litigation by a plaintiff who in fact has a valid cause of action. Second, they are subject to interpretation by nonlegal members of the militia as providing a license to act with total disregard for the law. Specific legislation and careful indoctrination of the militia can assist in avoiding such dangers.

Congress should reconsider its 1960 decision not to include the National Guard within the ambit of the FTCA.[85] A citizen paralyzed for life after being run down by an olive-drab truck owned by the United States,[86] driven by an individual in the uniform of the United States,[87] who is on duty fulfilling training requirements imposed by the United States,[88] and who is being paid by the United States,[89] is likely to be unimpressed by the Court's labored distinction between state and federal agencies. In the majority of jurisdictions, the injured have no recourse against the state. Moreover, suit against the individual tortfeasor, if allowed, is likely to provide inadequate relief.

Reductions in the active armed services have reemphasized the role that the National Guard plays in the national defense. It is the federal

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[84] 416 U.S. 232 (1974); *see* note 38 *supra*.

[85] H.R. REP. No. 5435, 86th Cong., 2d Sess. (1960).

[86] 32 U.S.C. § 710(a) (1970).

[87] *Id.* § 701.

[88] *Id.* § 502 (Supp. III, 1973).

[89] 37 U.S.C. § 206 (1970).

rather than the state entity that benefits directly from such service. The National Guard is receiving the most up-to-date equipment and material. Today, probably more than ever before, National Guard units have achieved parity with corresponding units in the active armed forces.

Amendment of the NGCA to permit judicial review of the administrative disposition of claims arising from actions of the National Guard is a logical progression in the federal recognition of responsibility. Once judicial review is granted, the courts will remain free to determine whether the acts complained of occurred in the service of the state or of the nation. This determination should be based on a consideration of the present profile of the National Guard inclusive of the pervasive federal influence. While past courts have characterized National Guard troops not expressly called into federal service by the President or by Congress as agents of the state, undoubtedly the view that National Guard troops not expressly called into state service by the governor are agents of the United States is preferred. Hopefully, subsequent remedial legislation will afford parties aggrieved by the conduct of the National Guard the advantages of the latter approach.

Billups S. Allen

ADJUSTING THE DEFAMATION STANDARD

> Because one man's liberty can be another man's constraint, because conditions of life in our dynamic society continue to change and because freedom at large is grand but elusive in the particular, the task of formulation is never ending.[1]

This might be the theme of the Supreme Court in attempting to reconcile the first amendment guarantee of free speech with the state's interest in protecting an individual's reputation through libel laws. In 1964, what began with *New York Times Co. v. Sullivan*[2] as a unified Court granting a conditional privilege for publications concerning acts of public officials has become a splintered Court differing greatly as to the type of speech protected, the extent of protection, and the constitutionally permissible remedies for injury to reputation.[3] The Supreme Court is not alone in its disparate views. One scholar considers the law of libel "among the most complex and troublesome in the whole field of First Amendment doctrine."[4]

This comment will examine the development of the first amendment's conflict with state defamation laws. Various approaches to the problem will be discussed, followed by an analysis of the Supreme Court's latest formulation in *Gertz v. Robert Welch, Inc.*[5]

I. Development of the Law of Defamation

A. General Background

A look at the background of defamation must begin with the following understanding:

> [T]here is a great deal of the law of defamation which makes no sense. . . . The explanation is in part one of historical accident and survival, in part one of the conflict of opposing ideas of policy in which our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue.[6]

The importance of protecting one's reputation was given early rec-

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[1] Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 Cornell L.Q. 581 (1964).

[2] 376 U.S. 254 (1964).

[3] T. Emerson, The System of Freedom of Expression 524 (1970).

[4] *Id.* at 517.

[5] 418 U.S. 323 (1974).

[6] W. Prosser, The Law of Torts § 111, at 737 (4th ed. 1971) [hereinafter cited as Prosser].

ognition. The church punished slander as a sin, claiming jurisdiction on the basis of correcting the sinner for the health of his soul.[7] The common law courts, which took jurisdiction from the ecclesiastical courts, however, were more concerned with the possibility that if a civil remedy were not provided, the individual might avenge his honor by resorting to violence.[8] Libel law protected not only private individuals, but also government officials.[9] High officers of a weak English church and state were protected by libel laws from the attacks of those opposing official policies.[10] This left a distaste for libel laws which carried over to the American colonies, especially in actions of libel against the government.[11] The use of juries to determine whether a statement was libelous or truthful was a colonial device used to protect the publisher for criticizing the government.[12] Defamation actions escaped disfavor only in the late 19th century, when courts became sensitive to the injury of an individual's reputation by modern newspapers. The present trend, however, is toward more restricted liability.[13]

B. Competing Interests

Defamation is communication which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[14] Western society has always held a good reputation was to be valued and protected.[15] Protection of this interest, however, may be withdrawn or lim-

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[7] Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 550 (1903).

[8] *See* T. EMERSON, *supra* note 3, at 518.

[9] A case before the Star Chamber gives an early rationale for libel prosecutions.

> *If it be against a private man it deserves severe punishment*, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends . . . to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience: *if it be against a magistrate, or other public person, it is a greater offence*; for it concerns not only the breach of the peace, but also the scandal of Government . . . .

Case de Libellis Famosis, 5 Coke Reports 125 A (1606), *quoted in* C. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS 4 (1971).

[10] Green, *Continuing the Privacy Discussion: A Response to Judge Wright and President Bloustein*, 46 TEXAS L. REV. 750, 755 (1968).

[11] C. LAWHORNE, *supra* note 9, at 23.

[12] *Id.* at 14-37; *see* 1 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 88-89 (1947).

[13] PROSSER § 111, at 738-39; Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413 (1910).

[14] RESTATEMENT OF TORTS § 559, at 140 (1938).

[15] R. PHELPS & D. HAMILTON, LIBEL 1-2 (1966); Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 891 (1949). An earlier expression of this view can

ited if it conflicts with a more important societal interest.[16] Overriding public interests call for a publication to be privileged.[17] "The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it."[18] The formulation of privileges is complicated by the conflicting nature of society's interest — the interest in protecting the individual's reputation through discouraging dissemination of falsehoods versus the interest in the free flow of information and comment necessary to a democracy.[19] When encouraging the flow of information is especially important, policy may require absolute immunity; proof that the publisher intended to injure the individual will not dissolve the immunity.[20] If the policy is of lesser social value, the privilege is qualified and may be defeated upon a showing that the publisher acted unreasonably or with improper motives.[21]

C. Fair Comment

The doctrine of fair comment, developed to accomodate modern means of communication, greatly enlarged the scope of privileged communication. Literary criticism was the first subject recognized in this area, but comments concerning any matter of legitimate public interest soon were covered.[22] The rationale of the privilege was that free public discussion was an effective tool in correcting abuses and in helping the public to make sound judgments on matters of public interest.[23] Fair comment also was felt to be required by the first amendment. Under the majority view, the privilege was limited to comments made without malice; misstatements of facts were not protected.[24] The scope was lim-

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be found in Shakespeare's *King Richard II*, Act I, scene i:

My dear, dear lord,
The purest treasure mortal times afford
Is spotless reputation: that away
Men are but gilded loam or painted clay.

[16] PROSSER § 114, at 776.

[17] 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.25, at 435 (1956) [hereinafter cited as HARPER & JAMES].

[18] Post Publishing Co. v. Hallam, 59 F. 530, 540 (6th Cir. 1893).

[19] Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730 (1967).

[20] *Developments in the Law—Defamation*, 69 HARV. L. REV. 877, 917 (1956).

[21] *Id.*; PROSSER § 114, at 776-77.

[22] Veeder, *supra* note 13, at 414-15. For an excellent discussion of the fair comment doctrine, see Noel, *supra* note 15.

[23] Noel, *supra* note 15, at 877.

[24] HARPER & JAMES § 5.26, at 449; *see, e.g.*, Burt v. Advertiser Newspaper Co., 154 Mass. 238, 243, 28 N.E. 1, 4 (1891), where Justice Holmes stated: "[W]hat the interest

ited because it was felt that a democracy required the citizens to make intelligent decisions, and such decisions could be made only on the basis of widespread, accurate information. Society's interest in correcting false statements about matters of public concern was as important as its interest in providing relief to aggrieved individuals.[25]

The more liberal minority view extended the privilege for fair comment to misstatements of fact made without malice. The leading decision expressing this position was *Coleman v. MacLennan*,[26] a 1908 Kansas Supreme Court case. Societal interests were balanced, but this time the scale tipped in favor of free expression.

> The importance to the state and to society of such discussions [of the character and qualifications of candidates for public office] is so vast and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.[27]

Prior to 1964 there was no major conflict between state libel laws and the first amendment; defamation was regarded as being outside the sphere of first amendment protection.[28]

D. A Constitutional Limitation

In *New York Times Co. v. Sullivan*,[29] for the first time, the Supreme

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of private citizens in public affairs requires is freedom of discussion rather than of statement." This view was adhered to by approximately three-fourths of the states. Malice was established under the traditional negligence standard—whether the publisher reasonably believed in the truth of his publication. Comment, *The Invasion of Defamation by Privacy*, 23 STAN. L. REV. 547, 548-49 (1971).

[25] Note, *supra* note 19. "Thus, it may be seen that the common law placed more emphasis on preventing untrue facts from entering public discussion than on preventing poorly founded opinion." 21 DE PAUL L. REV. 248, 250 (1971).

[26] 78 Kan. 711, 98 P. 281 (1908).

[27] *Id.* at 724, 98 P. at 286.

[28] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), where the Court upheld a state law prohibiting use of offensive words in public.

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . the libelous . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72.

[29] 376 U.S. 254 (1964).

Court imposed a constitutional limitation on a state's power to award damages to a public official defamed with regard to his official conduct.[30] The Court, in effect, adopted the minority view of the fair comment doctrine, citing with approval *Coleman v. MacLennan*.[31]

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[32]

The rationale was threefold: The criticism of public officials required a high degree of protection because of its proximity to seditious libel;[33] an analogous privilege existed for public officials;[34] and most importantly, democracy necessitated an open public forum.[35] The Court laid the foundation for later broadening its holding when it spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[36] The possi-

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[30] The New York Times published a political advertisement which solicited funds for the legal defense of the Reverend Martin Luther King, Jr. The advertisement, which contained some factual misstatements, depicted how black demonstrators had been harrassed by the police in Montgomery, Alabama. Sullivan, the Montgomery police chief, demanded a retraction and then brought suit for the allegedly defamatory statements. The jury awarded him the full $500,000 he had sought. The Alabama Supreme Court affirmed the verdict, holding that the fair comment privilege protected only opinions and not misstatements of facts about matters of public opinion.

[31] 78 Kan. 711, 98 P. 281 (1908).

[32] 376 U.S. at 279-80.

[33] *Id.* at 273-78.

[34] *Id.* at 282; *see* Barr v. Matteo, 360 U.S. 564 (1959), where the Court held that a statement by a federal official made in the scope of his duties was absolutely privileged. "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." 376 U.S. at 282-83.

[35] 376 U.S. at 269-73, 279-82.

Professor Kalven stated that "in its rhetoric and sweep, the opinion almost literally incorporated Alexander Meiklejohn's thesis that in a democracy the citizen as ruler is our most important public official." Kalven, *New York Times: A Note on "the Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 209.

Dr. Meiklejohn's philosophy has heavily influenced the Supreme Court in the first amendment area in the past decade. His first amendment views are based on the concept of the citizen as governor.

> [T]he First Amendment, as seen in its constitutional setting, forbids Congress to abridge the freedom of a citizen's speech, press, peaceable assembly, or petition, whenever those activities are utilized for the governing of the nation.

Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256.

[36] 376 U.S. at 270. "As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' " *Id.* at 271.

bility of abuse from such a privilege was recognized, but the Court felt this was outweighed by the threatened danger of self-censorship as a result of state law.[37] To make certain these policies were effectuated, the Court declared that it would review the evidence to ensure the principles have been constitutionally applied.[38] The plaintiff must meet this burden by proving with "convincing clarity" that the actual malice standard was satisfied.[39]

The Court in *New York Times* declined to give a comprehensive definition of what constituted a "public official" or "official conduct," but it indicated that the categories might be expanded.[40] *Garrison v. Louisiana*[41] first broadened the public official concept:

> The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant.[42]

The Court further clarified the actual malice standard, holding as constitutionally insufficient the trial court's instruction of malice as ill will or a statement not made in reasonable belief of its truth.[43]

The scope of public official was expanded 2 years later in *Rosenblatt v. Baer*[44] to include "at the very least . . . those among the

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[37] Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

Id. at 279 (citations omitted); *see* Comment, *Further Limits on Libel Actions—Extension of the New York Times Rule to Libels Arising from Discussion of "Public Issues"*, 16 VILL. L. REV. 955, 957 (1971).

[38] 376 U.S. at 285.

[39] *Id.* at 285-86.

[40] *Id.* at 283 n.23.

[41] 379 U.S. 64 (1964).

[42] *Id.* at 77.

[43] *Id.* at 78-79; *see* Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), where the Court held a standard of publication "with malice *or* with a reckless disregard of whether they were true or false" was not sufficient since the jury could find liability "merely on the basis of a combination of falsehood and general hostility." *Id.* at 9-10.

[44] 383 U.S. 75 (1966). The issue was whether statements made about a former supervisor of a county recreation area with regard to his financial management of the program should be accorded the *New York Times* privilege. The Court felt two fundamental princi-

hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[45] The Court recognized the strong state interest in protecting an individual's reputation, but found this interest was outweighed by the need for discussion of public issues.[46]

Whether the actual malice standard applied to public figures as well as public officials was decided in the consolidated cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.[47] Both Butts and Walker were held to be public figures: Butts "by position alone";[48] Walker "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."[49] The plurality stated that the public interest in the issues discussed was as great as in *New York Times*; therefore, such libel actions must be limited by constitutional safeguards. Nevertheless, *New York Times* concerned an area which bordered on seditious libel, a factor not present in *Butts* and *Walker*.[50] The Court applied a negligence standard, holding:

> [A] "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable

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ples were involved. "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." *Id.* at 85.

[45] *Id.* This was expanded in Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971), where the Court held:

> [A] charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the "knowing falsehood or reckless disregard" rule of *New York Times Co. v. Sullivan*.

Id. at 277; *accord*, Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

[46] This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation.

383 U.S. at 86.

[47] 388 U.S. 130 (1967). In *Butts*, the plaintiff, the University of Georgia athletic director, had been accused of conspiring with an opposing football coach to fix their upcoming game. *Walker* involved a wire service story which stated that the plaintiff, a former army general, had incited rioters against federal marshals during the desegregation of the University of Mississippi.

[48] *Id.* at 155.

[49] *Id.*

[50] *Id.* at 153-55.

> conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.[51]

Chief Justice Warren concurred in the result but argued that the *New York Times* actual malice standard applied to public figures as well as public officials so the public could be informed on "matters of legitimate interest."[52] Justices Brennan and White agreed with the Chief Justice, while Justices Black and Douglas felt an absolute privilege was required for matters of public concern. The plurality opinion, therefore, was not thought to be controlling, since a majority of the Court believed the standard for discussions of public figures, at the minimum, should be actual malice.[53]

In *St. Amant v. Thompson*,[54] the Court reiterated that the actual malice test went far beyond a determination of negligence.

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.[55]

In *Rosenbloom v. Metromedia, Inc.*,[56] in a move anticipated by many lower federal courts,[57] the Supreme Court extended the *New York*

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[51] *Id.* at 155.

[52] *Id.* at 164-65.

[53] *See* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 277-78.

[54] 390 U.S. 727 (1968). In a televised political speech, St. Amant read some defamatory statements made by a labor union member concerning activities of the president of the local union and his connection with Thompson, St. Amant's political opponent. The Supreme Court held that a clear and convincing showing of actual malice had not been made.

[55] *Id.* at 731. *See generally* Comment, *Calculated Misstatements of Fact Not Protected by First Amendment Guarantees of Free Speech and Press*, 13 UTAH L. REV. 118 (1969).

[56] 403 U.S. 29 (1971). *Rosenbloom* involved the radio news broadcast of the defendant's arrest for possession of obscene books, without qualifying the report by use of "allegedly." When Rosenbloom sought injunctive relief against future police interference, the defendant's broadcasts referred to the suit by "girlie-book peddlers" and the "smut literature racket." After being acquitted on charges of criminal obscenity, Rosenbloom brought a libel action against Metromedia.

For an excellent analysis of *Rosenbloom*, see Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547 (1972).

[57] False publications had been granted constitutional protection from libel suits where the statement involved a matter of significant public interest. *See, e.g.*, Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970) (organized crime); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970) (accomodations during Masters' Golf Tournament);

Times privilege "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[58] Rosenbloom had argued that a negligence standard was sufficient when a private individual was involved in a matter of public concern since: (1) the private individual lacks the access to the media usually available to a public person to counter the false statement; (2) a private person does not assume the risk of defamatory statements; and (3) society has a strong interest in preventing and redressing attacks on an individual's reputation. The Court rejected these contentions.[59] The ability to respond to falsehoods does not rest on whether one is a public figure, but on "the unpredictable event of the media's continuing interest in the story."[60] To the argument that public persons assume the risk of falsehoods, the Court countered this "legal fiction" stating that everyone in society exposes himself to others. "Voluntarily or not, we are all 'public' men to some degree."[61] The Court recognized the state's interest in protecting an individual's reputation, but felt that a negligence standard would not give first amendment guarantees necessary breathing room.[62] The actual malice standard was required to protect discussions of public issues from the self-censoring threats of large damage awards and costly litigation.[63] Although the plurality held that an issue of public or general concern was entitled to constitutional protection, it left the scope and the reach of that phrase to the lower courts.[64]

Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970) (organized crime); United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969) (public health).

[58] 403 U.S. at 44.

[59] *Id.* at 45-46, where the plurality stated: "Drawing a distinction between 'public' and 'private' persons makes no sense in terms of the First Amendment guarantees."

[60] *Id.* at 46. The assumption that private individuals are at a disadvantage in responding is an "unproved, and highly improbable, generalization that . . . seems too insubstantial a reed on which to rest a constitutional distinction." *Id.* at 46-47.

[61] *Id.* at 48.

[62] *Id.* at 50-52.

[63] *Id.* at 52-53.

[64] *Id.* at 44; *see, e.g.*, Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974) (commercial credit report sent to 11 subscribers held not to be a matter of public interest); Mistrot v. True Detective Publishing Corp., 467 F.2d 122 (5th Cir. 1972) (per curiam) (magazine story about double murder held to be a matter of public interest); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (allegation against mayor held privileged on the broader basis of public interest rather than on public official rationale); Gospel Spreading Church v. Johnson Publishing Co., 454 F.2d 1050 (D.C. Cir. 1971) (per curiam) (alleged abuse by church of federal and local religious tax exemptions held to be a matter of public interest).

II. Approaches to the Conflict

Given that the publisher cannot be left to the mercy of the states' libel laws, the question is what degree of protection is required by the first amendment. Freedom of speech is concerned primarily with the content, value, and relevance of speech, while libel laws focus on the individual defamed and his position, status, and function in society. Both sets of values are important, but each has a different logical basis. Analyzing, for example, the circulation of ideas which will inform the public, libel law is concerned with protecting reputation through suppressing all falsehood, while the first amendment emphasizes the positive, expansive side of the dissemination of all forms of information.[65]

Basically, there are three approaches to the conflict between the first amendment and state libel laws: the absolute approach, the issue approach, and the person approach.

A. The Absolute Approach

Those who follow the absolute approach read the first amendment literally: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[66] All speech must be protected on matters of public concern.[67] Absolutists discount the protection provided by the actual malice standard; a jury determination of whether a statement was made with knowledge of its falsity or in reckless disregard of whether it was true or false is to be distrusted. They argue that since such a standard is an abstract concept, a jury can find actual malice if it so desires; proponents of unpopular views on matters of public concern, therefore, would be punished.[68] Neither are trial or appellate judges trusted, since "[t]he 'weighing' doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press."[69] Nothing short of absolute protection is satisfactory if uninhibited discussion of public issues is sought.[70]

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[65] Comment, *supra* note 37, at 965.

[66] U.S. Const. amend. I.

[67] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964), where Justice Black in a concurring opinion stated: "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."

[68] Arkin & Granquist, *The Presumption of General Damages in the Law of Constitutional Libel*, 68 Colum. L. Rev. 1482, 1491 (1968); *see, e.g.*, Ginzburg v. Goldwater, 396 U.S. 1049, 1050-53 (1970) (Black, J., dissenting), *denying cert. to* 414 F.2d 324 (2d Cir. 1969); Garrison v. Louisiana, 379 U.S. 64, 79-80 (1964) (Black, J., concurring).

[69] Time, Inc. v. Hill, 385 U.S. 374, 399 (1967) (Black, J., concurring).

[70] For an excellent discussion of the first amendment views of the late Justice Black,

B. *The Issue Approach*

As does the absolute approach, the issue approach protects discussion of matters of public concern. But, at the same time, it recognizes society's interest in protecting an individual's reputation. This position was reflected in *New York Times*, where the Court stated that the first amendment expressed "a profound national commitment to the principle that debate *on public issues* should be uninhibited, robust, and wide-open . . . ."[71] Freedom of expression is essential for society to be better informed, a prerequisite to an interested and enlightened citizenry.[72] The chance of inadvertent falsehood was recognized as a necessary evil of allowing free expression of public issues,[73] but calculated lies were of no benefit and were deemed unprotected.[74] Since the purpose of the first amendment is to ensure free expression and discussion of ideas, the rationale of the issue approach is that constitutional protection must be based upon the issue which the publisher is discussing rather than upon the person involved in the issue.[75]

The major problem in utilizing this approach is defining "public issue." Most legal writers recognize the difficulty of defining the term clearly and would permit the media to define "a matter of public inter-

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a leading advocate of the absolutist view, see Yarbrough, *Justice Black, the First Amendment, and the Burger Court*, 46 MISS. L.J. 203 (1975).

[71] 376 U.S. 254, 270 (1964) (emphasis added).

[72] T. EMERSON, *supra* note 3, at 7; Kalven, *The Law of Defamation and the First Amendment*, in UNIVERSITY OF CHICAGO LAW SCHOOL, CONFERENCE ON THE ARTS, PUBLISHING, AND THE LAW 3, 17 (Conf. Series No. 10, 1952); Meiklejohn, *supra* note 35, at 255-56.

[73] Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). The Court stated:

> A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to "steer . . . wider of the unlawful zone," . . . and thus "create the danger that the legitimate utterance will be penalized."

Id. (citations omitted); *see* Z. CHAFEE, *supra* note 12, at 87; Berney, *Libel and the First Amendment — A New Constitutional Privilege*, 51 VA. L. REV. 1, 48 (1965).

[74] Garrison v. Louisiana, 379 U.S. 64, 75 (1964). The Court stated:

> [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . .

Id.; *see* Kalven, *supra* note 53, at 304; Comment, *supra* note 55, at 130-31.

[75] *See* Kalven, *supra* note 53, at 304-05; Comment, *supra* note 56, at 1565; Comment, *supra* note 37, at 962-66.

est" by equating that term with "newsworthiness."[76] Others believe the courts must determine the reach of the term.[77] If courts must decide what is a public matter, they have the necessary experience. In privacy cases[78] and under the fair comment rule,[79] the courts have determined whether an event was one of public interest. Public matters have been thought to be issues related to governmental activities, the well-being of the community, or issues involving public discussion or participation. Private matters are those "intimate details of personal life not reasonably related to the conduct or affairs of any group within the community."[80]

Some have argued this approach stifles rather than encourages expression. The fear is that by giving the press protection for comments on issues of public interest, fewer people might enter the arena to speak out on topics of legitimate public concern, and, thus, freedom of expression by the ordinary citizen will be curtailed.[81] Any significant restrictions on free expression in this respect, however, appear highly unlikely.[82]

The chief criticism of the issue approach is that it fails to protect adequately the individual's reputation. The actual malice requirement has been called a "staggering burden of proof," rarely met, thus leaving the plaintiff without an effective remedy when the subject is one of public concern.[83] The issue approach, however, gives greater protection to the individual, regardless of his status, when the subject is a private matter. Thus, the issue method attempts to balance society's interest in free speech and the protection of a person's reputation by a defini-

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[76] *See* T. EMERSON, *supra* note 3, at 541; Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases*, 18 U.C.L.A.L. REV. 371, 380-81 (1970); Kalven, *supra* note 53, at 281-84; Pedrick, *supra* note 1, at 593; 40 GEO. WASH. L. REV. 151, 158 (1971).

[77] *See* Comment, *The Continuing Erosion of the Libel Remedy Against the Press: "An Evil Inseparable from the Good"*, 17 S.D.L. Rev. 350, 368 (1972); 20 KAN. L. REV. 299, 306-08 (1972).

[78] Comment, *supra* note 24, at 555-57; *see* Time, Inc. v. Hill, 385 U.S. 374 (1967), where the Court held that constitutional protection extended to all matters of public interest in an action for invasion of privacy.

[79] RESTATEMENT OF TORTS § 606 (1938).

[80] Comment, *supra* note 24, at 565; *see* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214-16 (1890).

[81] *See* Z. CHAFEE, *supra* note 12, at 85; Barron, *Access to the Press—A First Amendment Right*, 80 HARV. L. REV. 1641, 1657-58 (1967); Eldredge, *Recent Developments in the Law of Defamation*, 33 AM. T. LAW. L.J. 113, 120 (1970); Comment, *Constitutional Law of Defamation and Privacy: Butts and Walker*, 53 CORNELL L. REV. 649, 658 (1968); Comment, *New York Times: The Scope of a Privilege*, 51 VA. L. REV. 106, 119 (1965).

[82] T. EMERSON, *supra* note 3, at 553; Eldredge, *supra* note 81, at 121.

[83] Eldredge, *supra* note 81, at 117; Comment, *supra* note 55, at 131.

tional rule that determines what speech is covered by the first amendment because it is somehow useful to the hearer in his governing capacity.[84] As in any other balancing approach, one side must necessarily suffer; here it is the private plaintiff involved in a public issue.[85]

C. *The Person Approach*

The third approach adjusts the privilege afforded by the first amendment to the status of the plaintiff. This position balances the effect of false statements on an individual's reputation against his conduct and participation in public discussion. Basically there are three categories of individuals and three corresponding levels of protection.[86] The public official is granted the least protection. Four factors require that actual malice be shown before he can recover. First, the public official is given immunity from libel suits for statements made in his official capacity. The argument is that citizens should be given a reciprocal privilege to criticize him.[87] Liability for criticizing a public official would also lie too close to seditious libel if protection were not given.[88] Public officials are also said to have assumed the risk of defamation by inviting public attention to themselves.[89] Finally, because of their public office, public officials are thought to have greater access to the media and, thereby, a more effective means of rebutting false statements.[90] Since only the last two factors are applicable to a public figure, a lesser privilege is accorded; gross negligence must be shown.[91] Where a private individual is the subject of the defamatory statement, none of these factors are present, and a negligence standard is appropriate.[92]

The person approach ensures that an individual's reputation is protected when no other means are available to counter false statements.[93] By having a privilege for statements concerning private persons which can be defeated by a showing of negligence, accuracy of reporting is encouraged. Publishers must thoroughly investigate reports to verify

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[84] Berney, *supra* note 73; Comment, *supra* note 55, at 128-29.

[85] Comment, *supra* note 37, at 980.

[86] Kalven, *supra* note 53, at 298.

[87] *See* note 34 *supra*.

[88] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 273-78 (1964).

[89] *See* Time, Inc. v. Hill, 385 U.S. 374, 408 (1967) (Harlan, J., dissenting); Comment, *supra* note 24, at 565.

[90] *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967); Comment, *supra* note 24, at 554.

[91] *See* text accompanying note 51 *supra*.

[92] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 62-72 (1970) (Harlan, J., dissenting).

[93] *See* Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 46 Texas L. Rev. 650, 657-58 (1968).

their correctness. Failure to act reasonably subjects the publisher to the possibility of libel suits. That publishers should operate under the restraint of fear of libel suits is not crucial to advocates of the person approach. The press should be held to the same degree of accountability for injuries it causes as any other group in society.[94] It is more equitable for the media, often viewed as "big business,"[95] to absorb and pass on to its customers the expenses of libel suits as the cost of doing business rather than leaving an injured plaintiff without reparation.[96] Also, the press can insure itself against liability.[97] A final argument is that such a standard will actually encourage free expression and open debate on public matters by protecting the speaker from attack, whereas protection based on "newsworthiness" may discourage citizens to speak out from fear they may be subjected to privileged defamation.[98]

The objections to this view are both practical and theoretical. As a practical matter, this position restricts the free flow of information in society. Fear of large damage awards based on unpredictable jury determinations of negligence will prevent the advocation of unpopular views or criticisms of popular ones and will have a detrimental effect on the discussion of important public issues.[99] Thus, since there is no clear standard to follow, publishers will "steer far wider of the lawful zone" and thereby "legitimate utterance will be penalized."[100] Theoretically, the person approach has been criticized as not being constitutionally relevant.[101] Professor Kalven best summarized the criticism by stating: "I suspect that, properly viewed, there is in the world of the First Amendment no place for 'the reasonable prudent man.' "[102]

III. GERTZ v. ROBERT WELCH, INC.

A. The Factual Context

A Chicago policeman named Nuccio had been accused of murdering Ronald Nelson. Elmer Gertz, a reputable Chicago attorney, was re-

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[94] *See* Kalven, *supra* note 53, at 301.

[95] *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-54 (1974); Shapo, *supra* note 93, at 653-57.

[96] *See* Shapo, *supra* note 93, at 659-60.

[97] Comment, *The New York Times Rule and Society's Interest in Providing a Redress for Defamatory Statements*, 36 GEO. WASH. L. REV. 424, 433-34 (1967).

[98] *See* Eldredge, *supra* note 81, at 119-21; Comment, *supra* note 24, at 563.

[99] *See* Z. CHAFEE, *supra* note 12, at 89; Cohen, *supra* note 76, at 386.

[100] Speiser v. Randall, 357 U.S. 513, 526 (1958).

[101] Berney, *supra* note 73, at 49. The author states that any rules adopted "must operate in a rational manner, relating to the constitutional interest being protected." *Id.* at 50.

[102] Kalven, *supra* note 53, at 303.

tained by the Nelson family to represent them in civil litigation against Nuccio. As the family's attorney, Gertz attended the coroner's inquest concerning Nelson's death and later filed suit against Nuccio in federal court. Gertz, however, had no connection with the criminal prosecution of Nuccio, who had been convicted. Despite the lack of any substantial connection with the prosecution, Gertz was portrayed as an integral part of a conspiracy against the police in the March 1969 edition of *American Opinion*, a John Birch Society publication. He was labeled a "Leninist" and a "Communist-fronter." The editor of *American Opinion* had relied on the free lance writer's past history of accuracy and made no effort personally to check the correctness of the article.

Gertz filed a diversity action for libel in the district court, claiming the false statements in *American Opinion* had damaged his professional reputation and his practice. The defendant answered the complaint but moved for summary judgment. It argued that since Gertz was a public official or a public figure and since the article concerned a matter of public interest, the *New York Times* standard protected it from liability as Gertz could not show actual malice. The district court denied the motion, not because the *New York Times* rule did not apply, but because it felt that Gertz might be able to prove the falsehoods were published in reckless disregard of the truth.[103] After the evidence was presented, but before the case went to the jury, the court ruled that the plaintiff was neither a public official nor a public figure. Had he been either, a directed verdict for the defendant would have been required.[104] Since some of the publication's statements were libelous per se under Illinois law, the jury was allowed to consider only the measure of damages and returned a verdict of $50,000.[105] After the jury verdict, the court reversed itself and held the *New York Times* rule would apply since the conditional privilege covered discussion of any public issue regardless of whether the person defamed was a public person or a private individual. It then entered a judgment notwithstanding the verdict since Gertz had presented insufficient evidence to support a finding of actual malice.[106] On appeal, Gertz challenged the application of the *New York Times* rule to his case. The Court of Appeals for the Seventh Circuit, however, affirmed the district court's application of the *New York Times* rule reasoning that the article was of "significant public interest."[107]

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[103] Gertz v. Robert Welch, Inc., 418 U.S. 323, 329 n.2 (1974).

[104] *Id.* at 328-29.

[105] *Id.*

[106] 322 F. Supp. 997, 1000 (N.D. Ill. 1970).

[107] 471 F.2d 801, 805 (7th Cir. 1972).

B. The Supreme Court's Decision

The Supreme Court reversed and remanded. Justice Powell delivered the Court's holding: The state may define the appropriate standard of liability for the publication of falsehoods which injure a private individual, regardless of whether the publication was a matter of public interest, but the private individual establishing liability under a standard less demanding than actual malice may recover only damages for actual injury.[108] The Court stated that although false statements of fact in themselves are not worthy of constitutional protection, some must be protected to avoid a cautious, restricted exercise of freedom of speech and press.[109] The societal value of compensating individuals for harm inflicted by defamatory falsehoods necessarily conflicts with the need for a vigorous, and uninhibited press.[110] Proper accomodation between these competing interests is required. The Court reasoned that since a private person, unlike a public person, has no available means of countering false statements, and since he does not voluntarily expose himself to the possibility of defamatory statements, he is more vulnerable to injury and more deserving of recovery.[111] Since application of the actual malice standard to a private individual would abridge the legitimate state interest to an unacceptable degree, each state may define the appropriate standard of liability for defamatory statements. The first amendment, however, prohibits imposition of liability without fault.[112] Also, since the state interest is in compensating individuals only for actual injury to reputation, states may not permit presumed or punitive damages unless actual malice is the basis of liability.[113]

Justice Blackmun also filed a concurring opinion. Referring to his joinder in the *Rosenbloom* plurality, he argued that not applying the actual malice standard to libel actions of private persons involved in matters of public interest was illogical. He joined the majority's opinion, however, because he believed the self-censorship threat was eliminated by the requirement of proof of actual injury and a definitive ruling in the defamation area was essential for certainty and predictability.[114]

There were four dissenting opinions. Chief Justice Burger advocated permitting the traditional rationale of defamation to evolve with regard to private individuals rather than "embark on a new doctrinal

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[108] 418 U.S. at 347-50.
[109] *Id.* at 339-41.
[110] *Id.* at 341-42.
[111] *Id.* at 344-45.
[112] *Id.* at 347-48.
[113] *Id.* at 349.
[114] *Id.* at 353-54.

theory which has no jurisprudential ancestry."[115] Justice Douglas also dissented, arguing that the first amendment completely protects discussion of all public issues.[116] Justice Brennan reemphasized his position in *Rosenbloom* that the proper accommodation between the protection of individual reputation and the avoidance of self-censorship by the media can be achieved only by requiring the actual malice standard for reports of public interest.[117] In a strongly worded dissent, Justice White castigated the majority for scuttling the states' libel laws in wholesale fashion, thereby leaving the ordinary citizen powerless to protect his reputation.[118] He saw no need to abolish strict liability and presumed damages; both are necessary to protect a person from defamatory falsehoods and to compensate adequately for damage to one's reputation.[119] Also, since substantially no showing was made that punitive damages cause self-censorship, he believed that remedy also should be left untouched.[120]

C. *Effects of the* Gertz *Decision*

The Supreme Court in *Gertz* prefaced its consideration of the issues by noting the "divergent traditions of thought" on reconciling state defamation laws with the first amendment.[121] Recognizing their objectives as ensuring a free and uninhibited press while maintaining adequate protection of an individual's reputation, the Court embraced the negligence concept as a compromise between the strict liability of common law and the higher level of privilege advocated by other members of the Court. Attempting to satisfy both objectives, the Court has satisfied neither. To assuage media fears of large jury verdicts in libel cases which dampen "uninhibited, robust, and wide-open" debate on public issues,[122] the majority limited recovery to damages for actual injury. To provide adequate protection for a private person's reputation, the Court predicates recovery on a showing of the publisher's negligence. On its

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[115] *Id.* at 355.

[116] *Id.* at 357-60.

[117] *Id.* at 361.

[118] *Id.* at 370. Justice White argued:

> These are radical changes in the law and severe invasions of the prerogatives of the States. They should at least be shown to be required by the First Amendment or necessitated by our present circumstances. Neither has been demonstrated.

Id. at 376-77.

[119] *Id.* at 388-95.

[120] *Id.* at 396-97.

[121] *Id.* at 333. For a discussion of the three approaches to this conflict, see part II *supra*.

[122] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

initial reading, this appears to be a fair accommodation. The presumption of general damages and punitive damages based on malice are taken from the plaintiff in exchange for a lowering of the publisher's level of privilege from the actual malice standard of *Rosenbloom* to that of negligence. A more detailed examination, however, reveals the inadequacies of this approach.

With regard to its attempts to ensure a free press which will not have to "steer far wider of the unlawful zone,"[123] although the instant decision lessens fears as to the size of verdicts against publishers, it increases apprehension as to the number of possible verdicts. The Court recognized that the size of libel verdicts has been a major deterrent to a vigorous press, but it overlooked the damaging effect of an increased number of libel suits, not so much in the aggregate amount of the awards as in time and expense involved in defending them.[124] The elusive standard of negligence also removes a great deal of certainty from the field of libel law because the publisher is unable to predict whether a jury will find his actions reasonable.[125] Thus, he is discouraged from fully exercising his constitutional guarantees. As a result, society suffers from the lack of adequate information on public issues.[126]

Certainly, lowering the level of the publisher's privilege increases the plaintiff's ability to recover. What the Court gives with one hand, however, it takes away with the other; the plaintiff is no longer permitted to presume general damages and is limited in his recovery to damages for "actual injury." General damages in actions for libel per se have always been presumed. Because of the special nature of the harm, actual damage to reputation often is not susceptible of objective proof; presumed damages permit the jury to speculate about the extent of the plaintiff's harm.[127] Special damages, those specific items of pecuniary loss caused by the defamatory statement, can rarely be proved.[128] How much the Court's requirement of "actual injury" takes away from the plaintiff remains to be seen. The Court refused to formulate a precise definition of "actual injury"; however, some of its traditional forms were acknowledged.[129] Moreover, "actual injury" can be narrowly con-

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[123] Speiser v. Randall, 357 U.S. 513, 526 (1958).

[124] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52-53 (1971).

[125] *See id.* at 50; Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); Z. CHAFEE, *supra* note 12, at 89. *See also* Cohen, *supra* note 76, at 386.

[126] *See* notes 71 through 74 and accompanying text *supra*.

[127] HARPER & JAMES § 5.30, at 468; C. MCCORMICK, DAMAGES § 116, at 423-24 (1935). Professor Kalven called the presumption of damages "[q]uite possibly the most single important rule in defamation." Kalven, *supra* note 72, at 12.

[128] HARPER & JAMES § 5.30, at 471; R. PHELPS & D. HAMILTON, *supra* note 15, at 243; Morris, *Inadvertent Newspaper Libel and Retraction*, 32 ILL. L. REV. 36, 44 (1937).

[129] 418 U.S. at 350, where the Court clarified the meaning of "actual injury":

strued.[130] If it is given a broad meaning, the plaintiff will be able to recover much the same as under the old standard. But that recovery will be at the expense of a press which will be subjected to both more numerous and larger jury awards. If "actual injury" is restrictively construed to be analogous to special damages, then the injured plaintiff is left without an effective remedy.[131] Furthermore, punitive damages, used to deter the defendant and others from similar conduct, are no longer permitted on a showing of ill will if the negligence standard is used. Thus, whether the ordinary citizen actually has been afforded more protection under the *Gertz* standard remains to be seen.

Given the goals of a free press and protection of reputation, a conditional privilege to report matters of public interest forfeited only by a showing of actual malice would seem to be preferred to the negligence approach. The argument is twofold: (1) Without such protection, the media will be deterred from fully discussing matters of public concern; and (2) given the shelter of actual malice, the press will not have a license to defame.[132]

A vigorous press requires both a clear standard of liability for libel and a broad scope of protection. The actual malice test provides both. A clear standard is necessary for the media to determine the zone within which to operate so that it may fully exercise its right and duty to inform the citizenry on matters of public concern. Predictability is a necessity.

> Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering . . . . [A]ll awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

[130] *See id.* at 393-95 (White, J., dissenting).

> [L]ibeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations . . . .
>
> The Court . . . ignores what . . . experience teaches, *viz.*, that damage to reputation is recurringly difficult to prove and that requiring actual proof would repeatedly destroy any chance for adequate compensation.

Id. at 393-94.

[131] It is conceivable that the plaintiff could be better protected under the actual malice standard than under the negligence-actual injury position. Under the former, the plaintiff could recover upon a showing that the statement was made with knowledge of its falsity or in reckless disregard of whether it was true or false. Under the latter, the defamed plaintiff could not recover unless he showed actual injury which, according to Justice White, would be difficult to do.

[132] In AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., ___ Ind. App. ___, 321 N.E.2d 580 (1974), an Indiana appellate court recognized the limited protection of negligence standard recommended by *Gertz* and held that the state constitution required the plaintiff to show publication with actual malice where the subject was a matter of public interest.

The actual malice test is a clear standard, having been delineated fully in the decade since the *New York Times* decision.[133] Also, the test of whether an event is a matter of public interest has long been used in privacy and fair comment cases; in the past 5 years the test has also been applied in defamation cases in lower federal courts.[134] If clarification of the reach of "public interest" is needed, a definitive statement by the Court could lay the issue to rest, just as it did for "public officials" in *Rosenblatt v. Baer*[135] and for "actual malice" in *St. Amant v. Thompson*.[136]

A privilege to report matters of public interest frees the publisher from fears of both expenses of litigation and large awards of money damages.[137] Such protection is essential.

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.[138]

Even if the higher level of privilege is afforded them, publishers will not freely defame. The actual malice standard itself ensures responsible journalism. While it is more difficult to obtain redress for defamatory statements under a greater privilege, it is not impossible; a showing of a calculated falsehood[139] or reckless disregard of the truth[140] will defeat the privilege. Whether actual malice exists is a question of fact determined by the jury. While juries will not be given unlimited discretion in making such a finding,[141] both trial and appellate courts give the plaintiff the benefit of jury determinations in questionable cases.[142]

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[133] For cases deciding whether or not actual malice was found to exist, see Comment, *supra* note 56, at 1565-66 nn.116 & 117.

[134] For cases ruling on whether or not the event was one of public interest, see *id.* at 1560-63 nn.94-97.

[135] 383 U.S. 75, 85 (1966).

[136] 390 U.S. 727, 731 (1968).

[137] Examples of such jury awards are: *New York Times*—$500,000 general damages; *Butts*—$60,000 general damages, $3 million punitive damages (reduced to $400,000 on remittitur); *Walker*—$500,000 general damages, $300,000 punitive damages (set aside because no malice was shown); *Rosenbloom*—$25,000 general damages, $750,000 punitive damages (reduced to $250,000 on remittitur).

[138] Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

[139] *See* note 73 *supra*.

[140] For a discussion of factors used in determining reckless disregard for the truth or falsity of the statement, see St. Amant v. Thompson, 390 U.S. 727, 732 (1968); Comment, *supra* note 77, at 361.

[141] Note, *supra* note 19, at 1750-51.

[142] C. LAWHORNE, *supra* note 9, at 262; Green, *supra* note 10, at 753; *see, e.g.*, Cantrell v. Forest City Publishing Co., 95 S. Ct. 465 (1974) (privacy case upholding a finding of actual malice even though no common law malice was present).

Thus, a jury may bend an otherwise inexorable standard to protect an individual's reputation.

Other factors also restrain the publisher. Professor Emerson has stated that libel laws are not the only force at work.

> Traditions, attitudes, and general rules of political conduct are far more important controls. The fear of opening a credibility gap, and thereby lessening one's influence, holds some participants in check. Institutional pressures in large organizations, including some of the press, have a similar effect; it is difficult for an organization to have an open policy of making intentionally false accusations.[143]

Ethical considerations which govern the conduct of journalists also ensure responsibility. The Canons of Journalism, adopted by the American Society of Newspaper Editors, serve as general guidelines for journalists.[144]

The canon on fair play points to an examination of the use of retraction as another means of protecting an individual's reputation under the actual malice privilege for matters of public interest. The Court in *Rosenbloom* approved this method:

> If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[145]

An important function of a libel suit is the restoration of the plaintiff's reputation. Retraction is the most effective means of securing a prompt, public vindication of his good name[146] and also serves society's interest

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[143] T. EMERSON, *supra* note 3, at 538.

[144] Comment, *supra* note 56, at 1569-70. Two sections of the Canons are especially noteworthy:

> Article III. Fair Play . . . .
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> . . . .
>
> 2. It is the privilege, as it is the duty, of a newspaper to make prompt and complete correction of its own serious mistakes of fact or opinion, whatever their origin.
>
> Article IV. Sincerity, Truthfulness, Accuracy—Good faith with the reader is the foundation of all journalism worthy of the name.
>
> 1. By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control, or failure to obtain command of these essential qualities.

Canons of Journalism of the American Society of Newspaper Editors (1923), *quoted in* Pedrick, *supra* note 1, at 600 n.65, 605 n.80.

[145] 403 U.S. at 47.

[146] Eldredge, *Practical Problems in Preparation and Trial of Libel Cases*, 15 VAND. L. REV. 1085, 1086 (1962); Morris, *supra* note 128, at 39.

in the free flow of accurate information.[147] A retraction statute, such as Mississippi's,[148] is helpful in attaining these goals. Since at common law a retraction was viewed as evidence of good faith, a refusal to retract after a showing of the statement's falsity could be viewed as evidence of actual malice.[149] It must be stressed, however, that the publisher be shown that the statement is false by clear and convincing proof; otherwise, the protection provided by the actual malice privilege would be destroyed. Another problem is that since the statute applies only to good-faith publication, there would be no incentive to retract if a colorable showing of actual malice were made. A publisher, however, would still be inclined to retract in the hope that the plaintiff would forego his libel suit or out of fear that such a refusal would make certain a jury's finding actual malice.[150]

The use of retraction is not without criticism. The chief one is that the media would be forced into self-censorship and would either be deterred from making the original publication or coerced into making retractions.[151] The danger of self-censorship, however, seems inconsequential. The burden of proof is on the person defamed to show by clear evidence that the statement is false; this gives the publisher considerable leeway. Furthermore, the publisher has sufficient time after notification to gather contradictory evidence to rebut the plaintiff's contentions. This, too, is necessary only upon a clear showing of the falsity of published statements.

The Supreme Court has not spoken to this use of retraction. In *New York Times*, the Court left open the question whether damages could

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[147] Note, *supra* note 19, at 1739; 11 DUQUESNE L. REV. 100, 105 (1972).

[148] MISS. CODE ANN. § 95-1-5 (1972). This section provides in part that prior to bringing an action for defamation against a newspaper or against a radio or television station domiciled or authorized to do business in the state, the plaintiff is required to give 10 days notice to the publisher, specifying the publication and the statements which are allegedly false and defamatory. If the publication was made in good faith, and a valid retraction is made within 10 days after the receipt of the notice, the plaintiff may recover only actual damages.

[149] Note, *supra* note 19, at 1741. The writer concludes:

> [P]redicating liability on a refusal to retract seems desirable; a publisher's reticence after falsity has been shown is an intentional rejection of an opportunity to mitigate damages previously inflicted and should result in liability despite the absence of actual malice at the time of publication. In a very real sense, giving currency to a defamatory statement is a knowing or reckless disregard of the truth.

Id. at 1742 (footnotes omitted). Thus, even if there was no showing initially of actual malice, a refusal to retract would be an after-the-fact attribution of actual malice to the defamatory publication.

[150] *Id.* at 1741.

[151] *Id.* at 1742-43.

be recovered if a valid request for retraction had been refused.[152] Also, in *Rosenbloom* the Court specifically stated that no request for a retraction was made, so that was not a factor to be considered in deciding whether actual malice existed.[153]

Conclusion

To resolve the conflict between society's interest in the protection of an individual's reputation and the necessity of a free and vigorous press, a privilege for discussions of matters of public interest defeated only upon a showing of actual malice is required. The late Chief Justice Warren summed it up well:

> It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation . . . . More significantly, however, the *New York Times* standard is an important safeguard for the rights of the press and public to inform and be informed on matters of legitimate interest . . . . [I]t will afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect.[154]

The Court must balance the competing interests by giving maximum protection to discussions of public interest and tolerating some degree of falsehoods, but calling for accountability for known lies and for defamatory statements concerning strictly private matters.

Stephen W. Rosenblatt

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[152] *See* 376 U.S. at 286. New York Times responded to Sullivan's request for retraction by stating it doubted that the advertisement referred to him. It sought clarification on this point, and therefore their refusal was not final.

[153] 403 U.S. at 35.

[154] Curtis Publishing Co. v. Butts, 388 U.S. 130, 164-65 (1967) (Warren, C.J., concurring).

PRETRIAL DISCOVERY UNDER THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

On April 22, 1974, the United States Supreme Court submitted to Congress a series of amendments to the Federal Rules of Criminal Procedure. The proposed amendments altered 10 existing rules and added 3 entirely new ones.[1] The amendments were promulgated pursuant to the Court's rulemaking power[2] and were to become effective on August 1, 1974.[3] These amendments affect significant areas of criminal law and procedure[4] and have been criticized by such diverse segments of the legal profession as the Department of Justice and the American Civil Liberties Union.[5] As a consequence of the criticisms and in order to extend the time for congressional consideration of the amendments, the Congress enacted a provision[6] postponing the effective date of the amendments for 1 year until August 1, 1975.[7]

This comment discusses one area affected by the proposed amendments: pretrial discovery and inspection in federal criminal cases as governed by Federal Criminal Procedure Rule 16. It will first review the history of criminal discovery in federal courts,[8] then examine the scope

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[1] *Amendments to Federal Rules of Criminal Procedure*, 416 U.S. 1001 (1974) [hereinafter cited as Amendments]. The amendments can also be found in *Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts*, 62 F.R.D. 271 (1974) (Advisory Committee Notes) [hereinafter cited as Notes to Proposed Amendments]. Rules 12.1, 12.2, and 29.1 were added, and rules 4, 9, 11, 12, 15, 16, 17, 20, 32, and 43 were amended.

[2] 18 U.S.C. §§ 3771-72 (1970).

[3] *Id.* § 3771 provides in part:

> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

[4] *See, e.g.*, rules 4 (imposing a "valid reason" standard for issuance of arrest warrants), 11 (requiring judicial approval of negotiated plea bargains), 12.1 (requiring pretrial notice of an alibi defense), 15 (allowing the prosecution the right to use depositions in criminal cases), 16 (affording liberal pretrial discovery rights to both the prosecution and the defense), and 43 (allowing waiver of a defendant's right to be present at trial) of Amendments. *See also* 120 CONG. REC. E6142 (daily ed. Sept. 30, 1974) (remarks of Representative Hungate).

[5] *See* 120 CONG. REC. E4209 (daily ed. June 25, 1974).

[6] Act of July 30, 1974, Pub. L. No. 93-361, 88 Stat. 397.

[7] The action followed a precedent set in 1973 when Congress indefinitely delayed the effective date of the proposed new rules of evidence for federal courts. *See* 119 CONG. REC. 8803 (1973).

[8] An exhaustive study of the contours of federal criminal discovery is not intended. The subject is treated adequately elsewhere. *See generally* 8 J. MOORE, FEDERAL PRACTICE ¶¶ 16.01 *et seq.* (2d ed. 1975); 1 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE §§ 251-61 (1969).

of discovery allowed under the existing rule and analyze the major changes under the proposed amendments to rule 16. The comment will conclude that problems created by the amendments outweigh the purported benefits and, therefore, that the proposed rule 16 should be rejected.

I. The History of Rule 16

Prior to the enactment of the original rule 16[9] in 1946, it was doubtful whether existing law permitted any pretrial discovery in federal criminal cases.[10] Discovery allowable to the criminal defendant was strictly within the trial court's discretion.[11] The original rule, however, authorized the district judge, upon demand of the defendant, to permit inspection of "books, papers, documents or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or by process . . . ."[12] A showing that the items sought were material to the preparation of the defense and that the request was reasonable were conditions precedent for access to these materials.[13] The scope of discovery under this rule was limited further by case law.[14] Names and addresses of witnesses were usually not discoverable,[15] nor were statements made by the defendant in the government's possession discoverable unless the statements were appropriated from the defendant and "belonged" to him in a legal sense.[16] The scope of the original rule 16

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[9] Fed. R. Crim. P. 16, 327 U.S. 821, 846 (1946) provided:

> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

[10] *See, e.g.*, Goldman v. United States, 316 U.S. 129, 132 (1941). *See also* Fed. R. Crim. P. 16, Advisory Committee Note, 18 U.S.C. Appendix (1970); 6 J. Wigmore, Evidence § 1850 (3d ed. 1940).

[11] *See* Goldman v. United States, 316 U.S. 129, 132 (1941).

[12] Fed. R. Crim. P. 16, 327 U.S. 821, 846 (1946).

[13] *Id.*

[14] For a discussion of the original rule and the cases construing it, see *Discovery in Federal Criminal Cases—A Symposium at the Judicial Conference of the District of Columbia Circuit*, 33 F.R.D. 47, 106-07 (1963).

[15] *See, e.g.*, United States v. Piper, 227 F. Supp. 735, 738 (N.D. Tex.), *aff'd per curiam*, 338 F.2d 1005 (5th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965); United States v. Bruce, 33 F.R.D. 133, 136 (N.D. Miss. 1963); United States v. Haug, 21 F.R.D. 22, 27 (N.D. Ohio 1957).

[16] *See* Williamson v. United States, 365 F.2d 12, 16 (5th Cir. 1966) (defendant not

and its usefulness to defendants was best described by one commentator as follows:

> [R]ule 16 was not designed to facilitate discovery of documents crucial to the preparation of a defense. Its purposes are more mundane: to protect the property right of the defendant in objects belonging to him and to insure him continuing access to any documents that the prosecution seizes from third persons through its subpoena power. . . . Though a defendant may freely inspect a business document, he may not see a purported confession in which he unfortunately has no property right. He may inspect documents obtained from third persons by seizure, but not documents obtained by threat of seizure. In matters of such importance, ritual is king as well as the joker.[17]

Thus, as a result of rule 16's weaknesses, cogent arguments for change,[18] and the limited scope of discovery allowed criminal defendants, pretrial discovery was enhanced by amendment in 1966. The old rule was completely reworded "to expand the scope of pretrial discovery" and at the same time "to guard against possible abuses."[19]

The present rule 16 is the defendant's principal means of criminal pretrial discovery in federal court.[20] Under this rule, discovery available

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entitled to statement which he signed and gave to FBI agent); Schaffer v. United States, 221 F.2d 17, 19-20 (5th Cir. 1955) (defendant not entitled to statement which he signed and gave to naval authorities); United States v. Brumfield, 85 F. Supp. 696, 707-08 (W.D. La. 1949) (statement by codefendant to grand jury did not "belong" to the defendant).

[17] Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 234 (1964) (footnote omitted).

[18] *See, e.g.*, Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113 (1957); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); *Symposium, supra* note 14.

[19] Advisory Committee Note, *supra* note 10.

[20] Although rule 16 governs discovery and inspection, there are a few other secondary discovery devices available to criminal defendants. Rule 6(e) permits disclosure of grand jury proceedings upon the request of a defendant in very limited circumstances. *See, e.g.*, Dennis v. United States, 384 U.S. 855 (1966) (policy of grand jury secrecy abridged discreetly and limitedly); United States v. Bryant, 364 F.2d 598 (4th Cir. 1966) (disclosure only upon showing of particularized need).

Under rule 7(f), a defendant may be granted a bill of particulars at the discretion of the court. *See, e.g.*, Will v. United States, 389 U.S. 90 (1967); United States v. Curry, 278 F. Supp. 508, 514 (N.D. Ill. 1967).

Rule 15 allows the defendant to take depositions of witnesses who will not be able to attend the trial, and rule 17(e) provides for a subpoena duces tecum. Both are subject to the trial court's discretion and have only limited benefits as discovery devices. *See, e.g.*, Bowman Dairy Co. v. United States, 341 U.S. 214 (1951); United States v. Trenary, 473 F.2d 680 (9th Cir. 1973).

to the defendant is divided into two separate sections. First, rule 16(a) gives the defendant access to his written or recorded statements in the government's possession or recorded before a grand jury. Section (a) also deals with discovery of the results of scientific tests and physical or mental examinations of the accused. It should be noted that the section does not retain the requirement of the 1946 rule of a showing of materiality and reasonableness. It is arguable, therefore, that a defendant has a presumptive rights to inspect 16(a) materials since the 1966 amendments added a "protective orders" provision[21] requiring court-ordered nondisclosure in the event of a showing of potential abuse.[22] Rule 16(a), however, was drafted in permissive terms,[23] and although the courts have generally granted requests under 16(a), the motion is still addressed to the discretion of the trial court.[24] Rule 16(a)'s one limitation on the defendant's access to requested materials is that they be relevant.

Federal Criminal Procedure Rule 16(b) deals with the inspection, copying, or photographing by the defendant of books, papers, documents, or other tangible objects or places which are within the possession, custody, or control of the government. This provision specifically excludes items governed by the Jencks Act[25] and items within the purview of the provision's "work product" exception.[26] The two important access limitations of the 1946 version of the rule remain intact: (1) the requested item must be material to the preparation of the defense,[27] and (2) the request must be reasonable.[28]

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[21] *See* FED. R. CRIM. P. 16(e).

[22] Moore, *Criminal Discovery*, 19 HAST. L.J. 865, 871 (1968).

[23] United States v. Louis Carreau, Inc., 42 F.R.D. 408, 412 (S.D.N.Y. 1967) (disclosure of 16(a) material not mandatory because the rule uses the term "may" instead of "shall").

[24] *See, e.g.*, United States v. O'Shea, 450 F.2d 298, 300 (5th Cir. 1971); United States v. White, 450 F.2d 264, 267-68 (5th Cir.), *cert. denied*, 405 U.S. 1072 (1971); United States v. Louis Carreau, Inc., 42 F.R.D. 408, 412 (S.D.N.Y. 1967).

[25] 18 U.S.C. § 3500 (Supp. III, 1973), *amending* 18 U.S.C. § 3500 (1970). This Act provides that a defendant may not inspect the recorded statements of prospective government witnesses prior to trial. However, once the witness for the government testifies on direct examination, the defendant is entitled to inspect all prior statements of that witness for impeachment purposes. *See also* Jencks v. United States, 353 U.S. 657 (1957).

[26] Rule 16(b) exempts from discovery "reports, memoranda, or other internal documents made by government agents in connection with the investigation or prosecution of the case . . . ." For a discussion of the scope of the "work product" exception of rule 16, see Note, *"Work Product" in Criminal Discovery*, 1966 WASH. U.L.Q. 321; *cf.* Hickman v. Taylor, 329 U.S. 495 (1947).

[27] *See, e.g.*, United States v. Calles, 482 F.2d 1155, 1161 (5th Cir. 1973); United States v. Gonzales, 466 F.2d 1286, 1288 (5th Cir. 1972); United States v. White, 450 F.2d 264, 267 (5th Cir.), *cert. denied*, 405 U.S. 1072 (1971).

[28] *See, e.g.*, United States v. White, 450 F.2d 264, 267 (5th Cir.), *cert. denied*, 405 U.S. 1072 (1971); United States v. Hughes, 413 F.2d 1244, 1254 (5th Cir. 1969), *vacated as moot*, 397 U.S. 93 (1970).

Another major change implemented by the 1966 amendment involves discovery by the government. Federal Criminal Procedure Rule 16(c) provides, in effect, a counterbalancing discovery right to defense discovery under sections 16(a)(2) and 16(b). The provision enables the government, upon satisfying certain conditions,[29] to "inspect, and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof . . . ."[30] Rule 16(c) also contains an exception for "internal defense documents" comparable to the exception provided in rule 16(b).[31]

"[S]tatements made by the defendant, or by . . . witnesses, or by prospective . . . witnesses, to the defendant" are also exempt from discovery by the government.[32] The exception does not apply to scientific or medical reports, both covered by rule 16(a)(2). The advisory committee note gives two examples (antitrust cases and use of psychiatric testimony) in which mutual disclosure appears necessary in order to prevent an unfair advantage to the defendant.[33] Discovery by the government under rule 16(c) is permissive only; therefore, within the discretion of the trial court, it may be granted or denied.[34]

From the above discussion, it can be seen that discovery in federal criminal cases has progressed from a "doubtful" existence in 1946 to a more sophisticated system of discovery under the present rule. A defendant is no longer limited to discovery based on proprietary interests; the rule has established guides for the district courts as to what types of

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[29] The government must show: (1) The defendant sought and the court granted relief under rule 16(a)(2) or 16(b); (2) the defendant intends to use the items at trial; (3) the defendant has possession, custody, or control of the items; (4) the items are material to the preparation of the government's case; and (5) the request is reasonable. *See, e.g.*, United States v. Garrison, 348 F. Supp. 1112, 1128 (E.D. La. 1972); United States v. Bally Mfg. Corp., 345 F. Supp. 410, 434 (E.D. La. 1972).

[30] FED. R. CRIM. P. 16(c).

[31] *See* note 26 *supra*.

[32] FED. R. CRIM. P. 16(c).

[33] Advisory Committee Note, *supra* note 10.

> [I]n cases where both prosecution and defense have employed experts to make psychiatric examinations, it seems as important for the government to study the opinions of the experts to be called by the defendant in order to prepare for trial as it does for the defendant to study those of the government witnesses. Or in cases (such as antitrust cases) in which the defendant is well represented and well financed, mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases.

Id.

[34] *See, e.g.*, United States v. Driver, 462 F.2d 808, 810-11 (5th Cir.), *cert. denied*, 409 U.S. 1061 (1972); United States v. Fratello, 44 F.R.D. 444, 451 (S.D.N.Y. 1968). For a discussion of the constitutional problems involved in reciprocal discovery, see text beginning at note 72 *infra*.

materials are within the limits of the defendant's inspection. In addition, the prosecution has been granted a limited, conditional right of discovery in the interest of promoting discovery as a "two-way street."[35]

II. The Proposed Amendment to Rule 16

Despite the advances procured by the 1966 amendment, rule 16 continued to draw criticism.[36] Primarily as a result of a growing feeling that a criminal defendant should be given an increased ability to discover the case against him,[37] the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States first proposed to amend the rules in 1970.[38] Although the proposed rule in its final form effects several changes, it would primarily change the existing rule in three significant ways. The proposal would eliminate most of the trial court's discretion in providing discovery to the defendant as a matter of right. Secondly, it would remove the conditional nature of prosecutorial discovery, affording the government, prior to trial, the right to discover both the physical evidence and the names of witnesses which the defendant intends to introduce at trial. Finally, it would enlarge the defendant's scope of discovery by allowing the defendant to discover the names and addresses of government witnesses.[39]

A. Mandatory Discovery

In drafting the proposed amendment to rule 16, the Advisory Committee contends that granting broader rights of discovery to both the defendant and the prosecution will contribute "to the fair and efficient administration of criminal justice."[40] This will be done

> by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence.[41]

The proposed amendment seeks to accomplish the above goals by elimi-

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[35] *See* Wardius v. Oregon, 412 U.S. 470, 475 (1973).

[36] *See, e.g.*, Comment, *Toward Effective Criminal Discovery: A Proposed Revision of Federal Rule 16*, 15 Vill. L. Rev. 655 (1970); Note, *Discovery of Witness Identity Under Preliminary Proposed Federal Criminal Rule 16*, 12 Wm. & Mary L. Rev. 603 (1971).

[37] *See, e.g.*, ABA Comm. on Pretrial Proceedings, Standards Relating to Discovery Procedure Before Trial 23-43 (1969).

[38] *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts*, 48 F.R.D. 553, 587 (1970).

[39] *Compare* Amendments, rule 16, *with* Fed. R. Crim. P. 16.

[40] Notes to Proposed Amendments, rule 16, at 308.

[41] *Id.*

nating the trial court's discretion in granting discovery to either the defense or the prosecution.[42] The amendment would make pretrial discovery a procedure accomplished entirely by the parties themselves except when disputes arise as to an item's discoverability or when protective orders are sought under proposed rule 16(d)(1).[43]

Commentators have taken various positions with regard to the discretion of the trial court in granting or denying discovery. For example, one noted authority claims the trial court's discretion in the area of criminal discovery is "little more than a euphemistic slogan for leaving the trial bench wholly at large and therefore, potentially, wholly arbitrary."[44] Another legal writer sees discretion as a necessary mechanism for achieving a balance between fair treatment of the defendant and avoiding the potential abuses of discovery.[45] At any rate, by framing discovery in broad terms as a matter of right, the proposed amendment would grant a benefit to defendants and federal prosecutors which neither has previously enjoyed. Such a profound reversal of the precedents[46] requires a closer consideration of the authorities upon which the rule-makers have relied.

One case cited by the Advisory Committee as demonstrating the need to make discovery of defendant's prior statements mandatory rather than discretionary is *United States v. Kaminsky*.[47] However, close examination of the case raises doubts about the necessity of the change. In *Kaminsky*, the defendant made "blanket requests" for pretrial discovery, and the court granted the defendant the right to inspect any FBI reports of interviews with the defendant which the

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[42] The ramifications of the prosecution's "right" of discovery are discussed more thoroughly in the text beginning at note 72 *infra*.

[43] The amendment reaches this result by revising the language of the rule to read that "the government shall permit" or the "defendant shall permit" rather than "the court may order." Compare FED. R. CRIM. P. 16.

[44] Louisell, *supra* note 18, at 56. *See also* Walcot's Case, 90 Eng. Rep. 1275, 1276 (K.B. 1793) (Holt, C.J., stated that discretion "is but a softer word for arbitrary").

[45] Moore, *supra* note 22, at 881-91. It is not the purpose of this comment to discuss the various theories in opposition to more liberal criminal discovery except as they relate to witness discovery. *See* text beginning at note 107 *infra*. In summary form, the opposition arguments are: (1) Discovery facilitates fabrication of evidence; (2) evidence could be altered or destroyed; (3) discovery gives the defense an unfair advantage; (4) discovery of witnesses leads to their intimidation or elimination; (5) sufficient discovery is had on an informal basis; and (6) discovery discourages independent investigation by defense counsel. These theories and others are adequately treated elsewhere. *See generally* Brennan, *supra* note 18; Moore, *supra* note 22, at 871-81; Rice, *Criminal Defense Discovery: A Prelude to Justice or an Interlude for Abuse?*, 45 MISS. L.J. 887, 896-911 (1974).

[46] *See, e.g.*, United States v. Newman, 476 F.2d 733, 739 (3d Cir. 1973); United States v. Stone, 472 F.2d 909, 916 (5th Cir. 1973); United States v. Armes, 470 F.2d 1353, 1355 (6th Cir. 1972), *cert. denied*, 410 U.S. 967 (1973).

[47] 275 F. Supp. 365 (S.D.N.Y. 1967).

government intended to offer in evidence. The court denied production of "any cryptic or 'foolscap' notes by the government attorneys"[48] since the notes did not constitute statements of the defendant. At the very least the case indicates that rule 16 motions should remain discretionary in order to discourage pro forma filing of irresponsible discovery motions. At most, the case argues for mandatory discovery of defendant's prior statements; it does not justify mandatory disclosure of other types of evidence. Similarly, other cases cited in the note have questionable value in demonstrating judicial abuse under the present rule.[49]

The Advisory Committee also attempts to extract some measure of support from United States Supreme Court cases. Two lines of cases arguably support the redrafting of rule 16 to provide a mandatory "right" of discovery. The first line of decisions is the progeny of *Brady v. Maryland*,[50] a case involving suppression of evidence favorable to the defendant by a state prosecutor. In *Brady*, the defendant made a pretrial request for inspection of statements of a coconspirator concerning a murder for which both had been charged. The prosecution produced all requested statements except one in which the coconspirator confessed to the actual killing. As this evidence was never presented at trial, Brady was sentenced to death under conditions which otherwise would have allowed the jury to recommend a lesser sentence under state law. Because the withholding of evidence did not absolve Brady of guilt, the Supreme Court affirmed a reversal on the issue of punishment only and stated in broad language:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[51]

It has been argued that *Brady* establishes a broad right of pretrial defense discovery in constitutional form.[52] This view is questionable, however, since the suppression cases[53] and the cases denying pretrial discovery can be distinguished. As one author has stated:

> In the suppression cases the prosecutor does not reveal evidence he

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[48] *Id.* at 367.

[49] *See, e.g.*, United States v. Diliberto, 264 F. Supp. 181 (S.D.N.Y. 1967); United States v. Louis Carreau, Inc., 42 F.R.D. 408 (S.D.N.Y. 1967).

[50] 373 U.S. 83 (1963).

[51] *Id.* at 87.

[52] Rice, *supra* note 45, at 890. *See also* Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

[53] *See* Giles v. Maryland, 386 U.S. 66 (1968) (suppression of evidence that could be used to impeach prosecution's chief witness held denial of due process).

> knows might exculpate the accused, and the jury makes its deliberations ignorant of this evidence; whereas in the case where pretrial inspection is denied, the evidence of which discovery is denied will be seen by the jury and defense counsel, and a trial will not have been had without all known, relevant evidence being before the jury.[54]

Accordingly, *Brady* does not create a pretrial constitutional right of discovery for the defendant; rather it requires that the prosecutor refrain from suppressing exculpatory evidence. The cases are in accordance with this interpretation.[55]

Although the proposed amendment to rule 16 does not attempt to codify the *Brady* holding, it does place considerable reliance on the due process rationale. The proposed amendment permits the defendant to discover tangible objects if any one of three situations exist: (1) the items are material to the preparation of the defense; (2) the items are intended for use as evidence by the government at trial; or (3) the items were obtained from or belong to the defendant.[56] The last provision restates the proprietary limitations of original rule 16;[57] the second provision codifies the holding that one test of materiality under the present rule is whether the government plans to use the requested information as evidence.[58] The first provision, however, is a paraphrase of the holding in *Brady*, a case which otherwise has no or only limited application to pretrial defense discovery.[59] In its note to the proposed amendment, the Advisory Committee further states:

> In *Brady* the Court held that "due process" requires that the prosecution disclose evidence favorable to the accused. Although the Advisory Committee decided not to codify the *Brady* rule, the requirement that the government disclose documents and tangible objects "material to the preparation of his defense" underscores the importance of disclosure of evidence favorable to the defendant.[60]

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[54] Moore, *supra* note 22, at 897.

[55] *E.g.*, United States v. Frick, 490 F.2d 666, 671 (5th Cir. 1973) (*Brady* not applicable at pretrial stages); United States v. Bally Mfg. Corp., 345 F. Supp. 410, 432-33 (E.D. La. 1972) (*Brady* is not authority for open-ended pretrial discovery demands); United States v. Eley, 335 F. Supp. 353, 358 (N.D. Ga. 1972) (*Brady* does not replace rule 16); United States v. Sklaroff, 323 F. Supp. 296, 310 (S.D. Fla. 1971) (pretrial discovery is not contemplated by *Brady*); United States v. Anzelmo, 319 F. Supp. 1106, 1129 (E.D. La. 1970) (*Brady* motion made prior to trial held premature); *accord*, United States v. Conder, 423 F.2d 904 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970). *See also* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 921, 22 Cal. Rptr. 879, 881 (1962).

[56] Amendments, rule 16(a)(1)(C).

[57] *See* text beginning at note 12 *supra*.

[58] United States v. Quinn, 364 F. Supp. 432, 446 (N.D. Ga. 1973); *see* United States v. Garrison, 348 F. Supp. 1112, 1127-28 (E.D. La. 1972); United States v. Sanders, 266 F. Supp. 615, 622 (W.D. La. 1967).

[59] *See* text accompanying notes 50 through 55 *supra*.

[60] Notes to Proposed Amendments, rule 16, at 311.

A second line of cases can be discerned from a study of the Advisory Committee's rationale for requiring disclosure of a defendant's statements. Some courts have construed the language of the present rule as giving the trial court discretion in granting discovery of a defendant's statements; other courts have held that the defendant need not show cause when seeking to discover his own statements.[61] The proposed amendment would resolve the ambiguity in favor of mandatory discovery. The rationale appears to be based upon the Supreme Court's language in *Cicenia v. Lagay*[62] where it was stated that disclosure of a defendant's statements "may be the 'better practice.' "[63] The Court, however, expressly held in *Cicenia* that the discretionary refusal of the trial court to allow the pretrial inspection of the defendant's confession did not violate due process.[64] Moreover, while disclosure has been called the "better practice," it has been held that a state statute which *prohibits* pretrial inspection of a defendant's confession does not violate due process.[65]

Reliance by the Advisory Committee on the *Brady* line of cases or the *Cicenia* line of cases for the proposition that there is a due process "right" of pretrial discovery is misplaced. This is not to say that Supreme Court decisions should be the sole guidance in granting discovery rights through the rulemaking process. It does, however, indicate that the proposed amendment goes far beyond the dictates of the due process clause in granting mandatory discovery to meet the avowed purpose of promoting the "fair and efficient administration of criminal justice."[66] Additionally, the grant of such extensive rights under the proposed amendment approaches the creation of substantive rights which might well be beyond the rulemaking power of the Supreme Court.[67]

Mandatory discovery will not promote efficiency in the administration of criminal justice. Rather than eliminating litigation, discovery as a matter of right would deprive the trial court of its traditional role in tailoring discovery to the particular needs of each case. The courts could become embroiled in litigation fostered by defense and prosecution over whether each side had fully complied with its mandatory disclosure obligations. For example, section (a)(1)(C) requires that the government

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[61] *Compare* United States v. Kaminsky, 275 F. Supp. 365 (S.D.N.Y. 1967), *with* United States v. Aadal, 280 F. Supp. 859 (S.D.N.Y. 1967).

[62] 357 U.S. 504 (1958).

[63] *Id.* at 511.

[64] *Id.* at 510-11; *accord*, Leland v. Oregon, 343 U.S. 790, 801 (1952).

[65] Hackathorn v. Decker, 369 F.2d 150, 153 (5th Cir. 1966).

[66] Notes to Proposed Amendments, rule 16, at 308.

[67] *See* United States v. Schwartz, 372 F.2d 678, 682 (4th Cir. 1967) (Federal Rules of Criminal Procedure are not constitutional requirements but procedural merestones).

disclose any documents or tangible objects "material" to the preparation of the defense, intended to be used in evidence by the government, or belonging to the defendant.[68] Since the Advisory Committee takes the view that "material" means "helpful" or "favorable," almost anything in the prosecution's file could be classified as material and would, therefore, be subject to disclosure. This broad standard of discovery would certainly prompt needless litigation.

Perhaps the best solution in determining whether discovery should be discretionary or mandatory would be to look to the type of evidence involved.[69] In its present form, the proposed amendment requires disclosure of all items—defendant's statements, defendant's prior record, documents and tangible objects, scientific examinations and tests, and government witnesses—regardless of the defendant's need for them or of their utility to him and without consideration for the varying potentials of abuse among particular types of evidence.[70] The rule offers little flexibility, except for its protective orders provision,[71] and seeks to dispel a complicated problem with a seemingly simple solution.

B. Reciprocal Discovery

While it is generally conceded that the government has adequate resources with which to prepare for trial,[72] the proposed amendment would grant the government the mandatory right to discover the names of defense witnesses and other tangible evidence which the defendant intends to offer at trial. This is based on the supposition that "the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution."[73] This provision prompted an adverse reaction from the American Civil Liberties Union to the proposed amendment to rule 16[74] because it raises serious questions concerning the defendant's fifth amendment privilege against self-incrimination.[75]

When the 1966 amendments to rule 16 were submitted to Congress by the Supreme Court, it was partly the present rule's provision for conditional prosecutorial discovery[76] that prompted Justices Douglas

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[68] *See* Amendments, rule 16(a)(1)(C).

[69] This solution is proposed in an excellent treatment of the subject. *See* Moore, *supra* note 22, at 882-92.

[70] *See* note 45 *supra*.

[71] Amendments, rule 16(d)(1).

[72] *See* Goldstein, *supra* note 18.

[73] Notes to Proposed Amendments, rule 16, at 307.

[74] *See* 120 CONG. REC. E4209 (daily ed. June 25, 1974).

[75] U.S. CONST. amend. V provides in part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[76] FED. R. CRIM. P. 16(c); *see* FED. R. CRIM. P. 16.

and Black to dissent from the Court's approval of the criminal rules. Justice Douglas argued:

> The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But if discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights?[77]

Implicit in Justice Douglas' argument is the idea that an independent right in the prosecution to discover the defendant's evidence prior to trial is per se unconstitutional. Since the proposed amendment would mandate unconditional discovery by the prosecution, the propriety of Justice Douglas' argument requires a closer look at the authorities respecting the defendant's self-incrimination privilege.

The Supreme Court initially dealt with the fifth amendment privilege in *Boyd v. United States*.[78] There the defendants had been ordered to produce business invoices for 35 cases of plate glass which allegedly had been imported in violation of the revenue acts. In reversing the lower court's order, the Supreme Court held that the seizure of a man's personal books and papers was violative of the fifth amendment.

> [W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.[79]

Since the *Boyd* decision, the self-incrimination privilege has been substantially restricted. The leading case defining the privilege is *Schmerber v. California*.[80] There the rule was stated as follows:

> The distinction which has emerged . . . is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.[81]

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[77] *Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rules for Criminal Procedure*, 39 F.R.D. 69, 277 (1966) (statement of Douglas, J.). In substantial agreement with Justice Douglas, Justice Black added that "some of the proposed criminal rules go to the very border line if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself." *Id.* at 272.

[78] 116 U.S. 616 (1886).

[79] *Id.* at 633.

[80] 384 U.S. 757 (1966).

[81] *Id.* at 764.

Accordingly, without violating the privilege against self-incrimination, the defendant may be compelled to give blood samples[82] or handwriting exemplars,[83] to appear in lineups,[84] or to be fingerprinted.[85] Under the *Schmerber* line of cases, the compelled or mandatory disclosure of scientific reports and other nontestimonial evidence, as provided by the proposed amendment, would probably avoid any conflict with the fifth amendment. However, much of the material made available to the prosecution by the proposed amendment could easily be classified as testimonial.[86] Therefore, to avoid violation of the privilege, pretrial disclosure by the defendant must be justified on some other grounds than the *Schmerber* "testimonial" distinction.

That justification originally came from the Supreme Court's holding in *Williams v. Florida*[87] and a host of state statutes requiring defense disclosure in certain instances.[88] In *Williams*, the Court upheld as consistent with due process a state statute requiring the defendant to give the prosecution advance notice of his intention to use an alibi defense and the names of witnesses to be used to corroborate the alibi. Penalty for noncompliance was the exclusion at trial of all the defendant's alibi evidence except his own testimony. The Court held that although the notice-of-alibi rule might be "testimonial" or "incriminating," it was not "compelled" within the meaning of the fifth amendment.[89]

In drafting the proposed amendment to rule 16 the Advisory Committee relied heavily on the rationale of the *Williams* case. If mandatory disclosure by the defendant applies only to evidence intended to be introduced at trial, "neither the incriminatory nor the involuntary aspects of the privilege against self-incrimination are present."[90] The pro-

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[82] Schmerber v. California, 384 U.S. 757 (1966).

[83] Gilbert v. California, 388 U.S. 263 (1967).

[84] United States v. Wade, 388 U.S. 218 (1967).

[85] *Cf.* Davis v. Mississippi, 394 U.S. 721, 727-28 (1969) (dictum).

[86] This could include witness lists and other documents which communicate the defendant's thought processes. *See* Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1003 (1972).

[87] 399 U.S. 78 (1970).

[88] *E.g.*, ARIZ. R. CRIM. P. 19.3; IND. ANN. STAT. §§ 9-1631 to -1633 (Burns 1956); MICH. COMP. LAWS ANN. §§ 768.20-.21 (1968); OHIO REV. CODE ANN. § 2945.58 (Page 1954).

[89] 399 U.S. at 84. The Court stated:

> [T]he notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial.

Id. at 85.

[90] Notes to Proposed Amendments, rule 16, at 315. *See also* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

posed amendment, therefore, seeks to satisfy the *Williams* doctrine by qualifying the extent of disclosure required of the defendant by the language "which [he] intends to introduce as evidence in chief at the trial" or "which he intends to call at the trial."[91] The Supreme Court in 1973, however, decided the case of *Wardius v. Oregon*[92] which carries negative implications with regard to the amended rule's rationale for mandatory disclosure by the defendant. In *Wardius* the Court held that a state notice-of-alibi statute was unconstitutional because, unlike the statute involved in *Williams*, it failed to provide for reciprocal discovery by the defendant of the prosecution's rebuttal evidence. The Court stated:

> It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.[93]

From the *Wardius* decision, reciprocal discovery in criminal cases appears to be necessary to strike the proper "balance between the accused and his accuser."[94] The balance required under *Wardius*, however, cannot be achieved under the proposed amendment as long as the prosecution has a right to discovery independent of any discovery by the defendant. Since the proposed amendment would allow the trial court to deny the defendant any opportunity to introduce evidence not previously disclosed to the prosecutor,[95]

> the defendant would be placed between the Scylla of providing the prosecutor with potentially incriminating information and the Charybdis of being precluded from offering elements of his defense. A defendant confronting this choice would frequently divulge potentially incriminating information to the state. Any device which exacted such a response would skew that balance between the state and the individual structured by the privilege against self-incrimination . . . .[96]

In light of the *Wardius* decision, the proposed amendment should be redrafted to give the prosecution a reciprocal rather than an independent right of discovery. This would defeat, or at least substantially

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[91] Amendments, rule 16(b).

[92] 412 U.S. 470 (1973).

[93] *Id.* at 476.

[94] *Id.* at 474.

[95] *See* Amendments, rule 16(d)(2), which provides in part:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may . . . prohibit the party from introducing evidence not disclosed . . . .

[96] Note, *supra* note 86, at 998.

weaken, the dominant motive for amending rule 16 in the first place—that broader defense discovery is dependent upon broader discovery by the prosecution. Arguably, if the scope of prosecutorial discovery is materially affected by the *Wardius* decision, then much or all of the expansion in favor of the defendant will have to be reconsidered and perhaps withdrawn. The safest course of action with regard to the fifth amendment questions raised by the proposed amendment would be to retain the present rule's provision for conditional prosecution discovery,[97] tempered by the trial court's discretion to deny prosecution discovery when the possibility of a fifth amendment violation exists.[98]

C. Witness Discovery

The third major departure from the existing limits of discovery made by the proposed amendment involves the required disclosure to the defendant of

> a written list of the names and addresses of all government witnesses which the attorney for the government intends to call in the presentation of the case in chief together with any record of prior felony convictions of any such witnesses.[99]

Witness discovery was unheard of at common law[100] and was also universally denied under the original version of rule 16.[101] More recently, notwithstanding Professor Wright's argument that witness discovery was contemplated as a matter of presumptive right by the drafters of the 1966 version of the rule,[102] the federal district courts usually have denied discovery of government witness lists as an exercise of their vast discretion in the area of discovery.[103] Some have even indicated that it is entirely beyond the scope of rule 16.[104] One court has held that since a federal statute[105] provides for witness discovery in capital cases at least

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[97] *See* 1 C. WRIGHT, *supra* note 8, § 256 (Supp. 1971); Moore, *supra* note 22, at 912.

[98] *See, e.g.*, United States v. Fratello, 44 F.R.D. 444 (S.D.N.Y. 1968).

[99] Amendments, rule 16(a)(1)(E). The prosecution is not required to disclose any prior recorded statements of its witnesses until after the witness testifies on direct examination. This result is required by 18 U.S.C. § 3500 (1970), *as amended*, (Supp. III, 1973).

[100] *See* 6 J. WIGMORE, *supra* note 10, § 1850, at 390.

[101] *See, e.g.*, Dean v. United States, 265 F.2d 544, 547 (8th Cir. 1959); United States v. Peltz, 18 F.R.D. 394, 397 (S.D.N.Y. 1955).

[102] *See* 1 C. WRIGHT, *supra* note 8, § 254, at 516.

[103] *See, e.g.*, United States v. Card, 470 F.2d 144, 145 (5th Cir. 1972), *cert. denied*, 411 U.S. 917 (1973); United States v. Baggett, 455 F.2d 476, 477 (5th Cir. 1972).

[104] *See, e.g.*, United States v. Chase, 372 F.2d 453, 466 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); United States v. Westmoreland, 41 F.R.D. 419, 427 (S.D. Ind. 1967); United States v. Margeson, 261 F. Supp. 628, 629 (E.D. Pa. 1966).

[105] 18 U.S.C. § 3432 (1970).

3 days before trial, Congress has evidenced its intent not to allow witness discovery at all in noncapital cases.[106] If this is true, the proposed amendment would effectively repeal the above statute.

The reason usually advanced for limiting discovery of the names of prosecution witnesses is that it will lead to either intimidation or elimination.[107] Although this proposition has been the subject of much debate,[108] it nevertheless deserves the attention of the rulemakers in achieving a proper balance between the attendant risks of discovery and the amount of discovery required to achieve optimum fairness to the defendant. It has been argued that the concern for witness safety is largely overemphasized and would occur, if at all, primarily in cases involving organized crime.[109] It should be remembered, however, that federal experience in this area is limited and that, as one commentator asserts, "measurement of how many witnesses have absented themselves due to bribery or coercion, or how many never came forward in the first place, is nearly impossible."[110]

The drafters of the proposed amendment seemingly justify the mandatory witness discovery provision on the basis of the states' experience. State practice, however, is varied. Some states require the defendant be notified of the prosecution witnesses who testified before the grand jury,[111] while a few states allow the trial court, in its discretion, to require disclosure of witnesses.[112] Implicit in the Advisory Committee's citation to these state statutes is the empirical suggestion that pretrial witness discovery has not led to the adverse consequences predicted by its opponents. It has been rightly noted, however, that

> state experience is . . . inconclusive because the prosecution may avoid the statutes' requirements in a number of ways: it may not call certain witnesses before the grand jury in those instances where it is able to

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[106] United States v. Margeson, 261 F. Supp. 628, 629 (E.D. Pa. 1966). The court applied the statutory construction maxim, *inclusio unius est exclusio alterius*.

[107] *See* State v. Tune, 13 N.J. 203, 98 A.2d 881, 884 (1953). *See also* Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962) (market retaliation in antitrust case); United States v. Estep, 151 F. Supp. 688 (N.D. Tex. 1957) (potential elimination of government informants in drug cases).

[108] *Compare Discovery in Criminal Cases—A Panel Discussion Before the Judicial Conference of the Second Judicial Circuit*, 44 F.R.D. 481, 483 (1968), *with* Louisell, *supra* note 18, at 100.

[109] Louisell, *supra* note 18, at 100.

[110] Moore, *supra* note 22, at 876.

[111] *See, e.g.*, ALASKA R. CRIM. P. 7(c); CAL. PENAL CODE § 995(a) (West 1970); IOWA CODE ANN. § 772.3 (1950); KY. R. CRIM. P. 6.08; MO. ANN. STAT. § 545.070 (Vernon 1953); ORE. REV. STAT. § 132.580 (1973).

[112] *See, e.g.*, ARIZ. R. CRIM. P. 15.3; ILL. REV. STAT. ch. 38, § 114-9 (1967); OKLA. STAT. ANN. tit. 22, § 384 (1964).

> obtain a true bill without them; or it may proceed by information, not by presentment and indictment before the grand jury.[113]

Thus, it is apparent that the state experience is a far cry from the mandatory witness discovery provision found in the proposed amendments.

Aside from the potential dangers of witness discovery, the provision seems to make an unnecessary concession to the proponents of more liberal discovery. The proposed amendment would move from the virtual absence of federal pretrial witness discovery to complete witness discovery. It would seem, however, that a more cautious approach is called for in light of the limited experience of the federal courts in this area. A compromise solution would be to leave witness discovery to the discretion of the trial court as originally proposed.[114] This course would serve the three-fold purpose of protecting against potential abuses, making it clear that witness discovery is contemplated by the rule, and giving the federal courts additional time to assess the desirability of witness discovery.

CONCLUSION

From the above discussion, it can be seen that the proposed amendment is not one free of problems. It remains to be seen whether an independent right of discovery in the prosecution can be upheld as constitutional in light of the Supreme Court's decision in *Wardius*.[115] Although a majority[116] of the Court has given tacit approval to the constitutionality of the provision, this conclusion is not certain since the Court is not at liberty to render advisory opinions.[117] As argued above, Congress would be well-advised to at least redraft the proposed amendment to grant only a conditional right of discovery in the prosecution similar to that provided by the present rule.[118]

Additionally, the proponents of the amended rule may have exceeded their statutory authority to draft rules of "procedure" since mandatory discovery in reality borders on the creation of substantive rights. In granting such broad rights to discover all types of evidence, the pro-

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[113] Moore, *supra* note 22, at 875 (footnotes omitted). *See generally* 6 J. WIGMORE, *supra* note 10, §§ 1850 *et seq.*; Note, *supra* note 36, at 608-16.

[114] *Preliminary Draft, supra* note 38, at 589. The original proposal used the term "may" rather than "shall." *Id.*

[115] *See* text accompanying notes 92 through 98 *supra*.

[116] Only Justice Douglas dissented from the transmittal of the proposed amendments. *See* Notes to Proposed Amendments, rule 43, at 328.

[117] *See* C. WRIGHT, LAW OF FEDERAL COURTS § 12 (2d ed. 1970).

[118] *See* text accompanying notes 97 & 98 *supra*.

posed amendment has overreached legitimate defense needs. As one author has proposed, the rule should be rewritten to provide for mandatory discovery of certain necessary items (for example, the defendant's prior statements, results of scientific tests, and prior criminal record) without disturbing the trial court's discretion to tailor discovery of other items (for example, witness lists and the catchall provision under rule 16(b)) according to the potential dangers involved in allowing discovery of every type of evidence.[119]

The proposed amendment to rule 16 may add a host of unnecessary pretrial issues to an already overburdened federal criminal process. In promoting fair and efficient pretrial discovery techniques, the total effect of the proposed amendment to rule 16 more accurately reflects a distrust of the federal judiciary in dealing fairly with criminal defendants and a desire to facilitate plea bargaining and nonjury determinations of guilt and innocence. As to the latter, no one knows better than the federal judiciary the need to eliminate the backlog of cases on its criminal dockets. But this elimination should not be achieved at the high price of wholesale reversal of the precedents in criminal discovery. Although the judicial interpretation of the scope of discovery allowed by the federal rules has at times been best described as paltry, it has nevertheless provided cautious, deliberate expansion. Certainly it has not been so slow and unjust as to merit the establishment of discovery rules akin to those provided by the Federal Rules of Civil Procedure.[120]

The most cogent criticism of the proposed amendment to rule 16 is that it is unnecessary. Congress has left the courts free to expand discovery by use of their "inherent power to foster a wholesome integration of discovery procedures into the judicial process."[121] Broader discovery can be achieved in the federal criminal system without the imposition of an inflexible rule which provides for strict mandatory discovery. Rule 57(b) provides that if no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.[122] The best example of an enlightened application of this provision to rule 16 discovery is in *United States v. Richter*.[123] In that case the defendants were charged with conspiracy and violation of various gambling laws. After defense's motion for discovery

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[119] *See* Moore, *supra* note 22, at 881-92.

[120] *See* FED. R. CIV. P. 26-37. The courts have consistently rejected the idea that criminal discovery is analogous to civil discovery. *See, e.g.*, Gordon v. United States, 344 U.S. 414, 419 n.9 (1953); United States v. Hancock, 441 F.2d 1285, 1287 (5th Cir. 1971); Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962).

[121] *See* Traynor, *supra* note 17, at 240.

[122] FED. R. CRIM. P. 57(b).

[123] 488 F.2d 170 (9th Cir. 1973).

of all government witnesses, the trial court granted a limited motion to discover those government witnesses who would testify concerning the defendants' involvement in a gambling ring. After the prosecution refused to comply with the order,[124] the indictment was dismissed.

The Court of Appeals for the Ninth Circuit reversed the dismissal but held that discovery of prospective government witnesses can be achieved through an application of rule 57(b). Stating that rule 16 in no way sets the outer limits of the power of the court to grant discovery and that witness discovery is not inconsistent with any applicable statute or rule,[125] the court held:

> If a defendant desires discretionary disclosure of the government's witnesses, he should make the showing similar to that required by rule 16(b). If the court wishes to entertain the motion and if the government feels that it has a valid reason for resisting that discovery, it should move for a protective order similar to that provided for under rule 16(c). Following these procedures will insure that there is an adequate basis for requesting such discovery and will afford the government a known method for resisting the request. Furthermore, the procedures will produce a record which will enable and facilitate appellate review when it is claimed that the trial judge abused his considerable discretion.[126]

Richter presents the most desirable approach to expanded criminal discovery yet taken by a federal court. Utilizing their inherent power to experiment with and expand discovery, the federal courts can avoid dealing with a new rule of such questionable value as the proposed amendment. The future of federal criminal discovery requires no less than the *Richter* approach so that the courts will meet their "responsibility to supervise the administration of criminal justice in order to ensure fundamental fairness."[127]

E. Stephen Williams

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[124] The United States attorney filed a notice of noncompliance in order to obtain appellate review of the unprecedented order for witness discovery. *Id.* at 172.

[125] The court expressly rejected the application of the maxim, *inclusio unius est exclusio alterius*, to 18 U.S.C. § 3432 (1970). 488 F.2d at 173 n.6.

[126] 488 F.2d at 175.

[127] United States v. Baird, 414 F.2d 700, 710 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970).

PRIVATE ANNUITIES: AN ALTERNATIVE FOR ESTATE PLANNING

An annuity is an arrangement whereby cash or other property is transferred in return for a promise that certain regular payments will be made to the transferor.[1] The payments are usually received monthly or annually and are customarily paid until the death of the transferor.[2] Annuities are divided into two categories: commercial and private. Commercial annuities are generally issued by insurance companies or others who issue such contracts as a part of their business activity. Private annuities are issued by persons not engaged in the regular business of issuing them.[3] Private annuity arrangements are often intrafamily transactions involving the transfer of property from an older, wealthier family member to a younger, less established one.[4]

The primary motivation behind the use of private annuities is a desire to avoid estate, gift, and income taxes. Because the private annuity is a "sale," the value of the property transferred is removed from the transferor's estate, provided the transferee has paid a full and adequate consideration for the property and has retained no interest in the property.[5] The "sale" reasoning also prevents the application of contemplation of death arguments made in an attempt to include the property in the transferor's gross estate.[6] If the annuity payments are deemed adequate consideration for the transferred property and no donative intent is evidenced, the transfer can be made without gift tax consequences.[7]

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[1] S. Foosaner, Taxation of Life Insurance and Annuities § 3.06, at 44 (1960); Phillips, *Private Annuities in Estate Planning*, 52 Taxes 50 (1974); Stewart, *Private Annuities*, 24 Mercer L. Rev. 585, 590 (1973); Comment, *Latest Developments in the Tax Treatment of Private Annuity Transactions*, 47 Texas L. Rev. 1395 (1969).

[2] S. Foosaner, *supra* note 1, § 3.06, at 44. *Compare* Woodroof, *Annuities Regulation in a Changing Society*, 7 Calif. W.L. Rev. 307, 315 (1971), *with* Note, *Private Annuities: Revenue Ruling 69-74—Its Significance, Effect, and Validity*, 23 Vand. L. Rev. 675 (1970).

[3] Phillips, *supra* note 1, at 50; *see* S. Foosaner, *supra* note 1, at § 3.06.

[4] B. Ellis, Private Annuities A-1 (195-2d BNA Tax Man. Port. 1973).

[5] *See generally id.*; Midgley, *Federal Income Taxation of Private Annuities*, 40 Geo. Wash. L. Rev. 679, 680 n.5 (1972).

[6] *See* Int. Rev. Code of 1954, § 2035(b) [hereinafter cited as Code]; Note, *supra* note 2, at 675 n.4.

[7] Code § 2512(b). *See* Beattie v. Commissioner, 159 F.2d 788 (6th Cir. 1947), where even though the value of the annuity promise was substantially less than that of the property transferred, the court found no gift because of a lack of donative intent on the part of the annuitant. For an analysis of donative intent, see Estate of Lloyd G. Bell, 60 T.C. 469 (1973) (utilizing the full and adequate consideration test); Estate of Koert Bartman, 10 T.C. 1073 (1948).

It is difficult, however, to show an absence of donative intent if the transferee is a relative of the transferor or where the value of the property transferred is significantly greater than that of the annuity. *But see* Eva B. Hall, 21 CCH Tax Ct. Mem. 199 (1962), where the transferee was allowed to show that the transferor simply made a bad bargain.

If the value of the property exceeds the value of the annuity payments, then a gift

Income produced by the property can, therefore, be successfully shifted from the annuitant's tax bracket to the transferee's bracket, which is often lower than that of the annuitant.

If an individual knew his exact date of death, he could easily determine the amount of money needed to live comfortably the rest of his life. The fact is, however, people do not know how long they will live; consequently, they do not know how much money to set aside for their maintenance. As a result, many persons set aside as much (money or property) as possible to ensure that they will not be caught with time left after their finances have been exhausted. This hoarding tendency ultimately results in the inclusion of excess property in the decedent's estate.[8] The private annuity offers a desirable alternative to this dilemma.

The major disadvantage of private annuities is that the transfer must be complete; the annuitant cannot retain a security interest to ensure the contractual payments.[9] Any security interest in the property will create a retained life estate resulting in the inclusion of the property in the annuitant's estate.[10]

Another significant disadvantage encountered with private annuities is the complexity and confusion related to their use. Two authors have appropriately characterized private annuities as either valuable tools or dangerous weapons depending upon how they are employed.[11] Where factual situations meet certain critical requirements, however, the private annuity offers many advantages in estate planning.

I. Advantages and Use of Private Annuities

If property is sold for cash which is then used to purchase a commercial annuity, the annuitant will not receive as much value as if he had exchanged the property in a private annuity arrangement. The reasons for this are: (a) When the property is sold, immediate capital gains are recognized,[12] reducing the amount available for purchasing the commer-

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may result to the extent of the excess. The imposition of the gift tax, however, may not be particularly disadvantageous considering that gift tax rates amount to approximately three-fourths of the applicable estate tax rates. *Compare* Code § 2001, *with id.* § 2502.

[8] Code §§ 2031, 2033.

[9] Note, *The Use of Annuities in Retirement and Estate Planning*, 53 Iowa L. Rev. 925, 934 (1968); *see* Weinberg, *The New Case for Private Annuities*, 51 Neb. L. Rev. 9, 35 (1971).

[10] Code § 2036; *see* Tips v. Bass, 21 F.2d 460, 462 (W.D. Tex. 1927) (§ 2037 property transferred to trust as part of security arrangement); *cf.* Greene v. United States, 237 F.2d 848 (7th Cir. 1956) (annuity payments exactly equalled income from property, as provided in agreement); Estate of Cornelia B. Schwartz, 9 T.C. 229, 237 (1947) (annuity payments clearly based on amount of income from property).

[11] 1 J.A. Appleman & J. Appleman, Insurance Law and Practice § 82, at 113 (rev. ed. 1965) [hereinafter cited as Appleman].

[12] Code §§ 1001-02.

cial annuity; and (b) commercial annuities have a built-in profit factor (to the transferee) that renders them somewhat less valuable than private ones.

Older persons who have set aside capital to provide for their needs often resort to one of two choices: (1) They can live solely on the income or interest produced by the capital, or (2) they can invade the corpus of the capital whenever the interest alone is insufficient to meet their needs. Inflation has caused many people to invade their capital. This tends to intensify the problem since less income is produced in the next year. A subsequent invasion becomes more likely, and so on, until a dangerous "spiral"[13] is set into motion. Many people were devastated by this particular phenomenon during the 1930's.[14]

The use of an annuity would provide a method whereby a person could utilize both his capital and its interest without risking a lack of money in his later years. His resources would last exactly the right length of time, until the very day of his death.[15] Where a program is set up to utilize both capital and its income, the net effect is to require less capital to produce a given return than would have been needed if only the income were used. Thus a certain part of the capital could be released for more speculative investment[16] with a potentially higher rate of return.

A. Family Property

Private annuities are attractive to persons with "family" property or with stock in closely held corporations.[17] Often there would be no market for the property or stock outside of the family, and at the same time there might not be a family member with sufficient finances to make an outright purchase of such holdings.[18] The private annuity provides a method whereby the annuitant may transfer the property to the other family member in return for a regular amount to be paid for the rest of his life.[19] The annuitant can determine on a yearly basis how much money will be required for his maintenance and then dispose of any excess amounts that he may have received.[20]

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[13] Note, *supra* note 9, at 933.

[14] *Id.*

[15] Stewart, *supra* note 1, at 591.

[16] The annuitant can invest in more diversified holdings and not be dependent upon a single source of income. Note, *supra* note 2, at 697.

[17] B. ELLIS, *supra* note 4, at A-2; Weinberg, *supra* note 9, at 33.

[18] Stewart, *supra* note 1, at 591.

[19] It can be said that an "even" liquidation of the property has occurred. *See* Woodroof, *supra* note 2, at 316; Note, *supra* note 9, at 933.

[20] This can be accomplished through a regular dispositive program which utilizes the $3,000 annual per donee exclusion and the $30,000 lifetime exemption afforded to gifts.

B. Property Management

Management responsibilities can be shifted away from an annuitant who is desirous of more leisure time after having managed the property for many years.[21] Also, inter vivos disposition of the property to the exact person to whom the annuitant wishes it to go can be accomplished by a private annuity arrangement. Income produced by property can be shifted into the lower tax bracket of the transferee and thus out of the annuitant's higher bracket.

C. Will Contests and Partitions

Will contests and partitions can be avoided by completely disposing of the property prior to the annuitant's death. The complete transfer of the property would avoid estate taxes,[22] and to some extent contemplation of death and retained life estate arguments could be averted.[23] There is a possibility that a private annuity could be employed by one desirous of defeating the spouse's forced share in the estate.[24]

D. Insurance

Private annuities are available to individuals who are unable to secure insurance coverage on themselves since a showing of good health is not required prior to the purchase of an annuity.[25] Prospective annuitants who have a family history of long life spans may find annuity contracts appealing. The trend is toward increased life spans, and persons may be reasonably able to predict that they will live longer than current actuarial tables indicate.[26] The result would be that an annui-

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CODE §§ 2503(b), 2521. These amounts can be extended to $6,000 and $60,000, respectively, if the annuitant and his spouse make the gifts together. *Id.* §§ 2503(b), 2513(a), 2521. In any event, the annuitant can retain an accumulated "nest egg" up to $60,000 ($120,000 if married) which would be estate-tax-free upon his death. *Id.* § 2052. The $120,000 amount is obtained by utilization of the marital-deduction provision in section 2056 of the Code.

[21] *See* Note, *supra* note 9, at 933.

[22] B. ELLIS, *supra* note 4, at A-1; Weinberg, *supra* note 9, at 32.

[23] In Estate of Hilda M. Lenna, 19 CCH Tax Ct. Mem. 803, 806 (1960), the court held that a transfer of stock in a closely held corporation in order to maintain family control was not necessarily made in contemplation of death. Ruby L. Cain, 37 T.C. 185 (1961), *acquiesced in*, 1962-2 CUM. BULL. 4, successfully avoided the retained life estate provisions because the transferee had an absolute obligation to pay, and the amount of payments was not related to the income of the property.

[24] MISS. CODE ANN. § 91-5-25 (1972) (right to renounce).

[25] Note, *supra* note 9, at 933.

[26] W. VANCE, LAW OF INSURANCE § 200, at 1025 (3d ed. B. Anderson 1951); *see* Treas. Reg. § 20.2031-10(f) (1970) (Tables A(1)-A(2)).

tant would receive payments for a longer period than could have been predicted.

II. Disadvantages of Private Annuities—Suggested Remedies

The most serious objection to annuities is peculiar to those which are private; the transferee simply may fail to make the regular payments. Since an annuitant must be careful to avoid retaining a security interest in transferred property in order to successfully remove it from his estate,[27] the personal liability of the transferee is all that the annuitant receives in exchange for his property. Thus a transferee must be dependable. This could explain why most private annuities are intra-family dispositions. Even in the absence of bad faith on the part of the transferee, many things can go wrong: The transferee may predecease the annuitant; the transferee may become insolvent; or he simply may not be able to meet the payments under the annuity because the property failed to produce income.[28]

A. Death of the Transferee

In the event of early death, the transferee's estate will remain liable for the payments under the annuity contract.[29] If the estate has insignificant assets, however, this contingent liability will in reality be meaningless. The property that was the subject of the annuity may have to be sold in order to make the payments.[30] This would defeat many of the objectives for which the property was originally transferred. A possible remedy would be to have the transferee insure his life so that liquid assets will remain in his estate. The annuitant alternatively might insure the life of the transferee. However, this could be construed as a security interest, causing the property to remain in the annuitant's taxable estate.

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[27] Greene v. United States, 237 F.2d 848 (7th Cir. 1956); Estate of Cornelia B. Schwartz, 9 T.C. 229, 237 (1947).

[28] Property transferred under a private annuity contract must be property that produces a certain amount of income. *See* Weinberg, *supra* note 9, at 34. In addition, it would be advisable for the transferee to have other sources of income. See cases cited note 27 *supra*.

Under no circumstances should the transferee make payments to the annuitant if the income derived from the transferred property exceeds the amount of the agreed periodic payments since this could indicate a retained life estate in the property with rights to the income. *See* Code § 2036. For a discussion of a situation where annuity payments were made out of income from the property, see Updike v. Commissioner, 88 F.2d 807, 813 (8th Cir. 1937).

[29] *See* Appleman § 81; Weinberg, *supra* note 9, at 35.

[30] *See* Weinberg, *supra* note 9, at 37.

B. Death of the Annuitant

The late death of the annuitant could cause the transferee to pay significantly more for the property than it is worth, and generally the investment return may be lower than would have been realized through other investment of the capital.[31]

The early death of the annuitant may cause many problems: (a) The estate of the annuitant will not be allowed to deduct any loss from his final tax return;[32] (b) the transferee may suffer the recapture of depreciation taken on the property[33] since his basis suddenly becomes equal to the amount which he actually paid to the annuitant; (c) if the transferee has already sold the property, then his newly acquired adjusted basis (resulting from the annuitant's death) may cause an immediate recognition of capital gain;[34] (d) if the transferee sells the property after the annuitant's death, he may suffer from having a lower basis than if he had inherited the property with a stepped-up basis;[35] and (e) the Commissioner may determine that a gift of the property was intended where it can be shown that the annuitant knew he would live less than the tables predicted. The cases, however, tend overwhelmingly to favor the decedent.[36]

Although the annuitant is required to pay income tax on that part of the regular payments determined to be "interest," the transferee is not allowed a deduction for this amount.[37] A probable remedy exists if the annuity agreement specifically provides for a certain amount of the premiums (payments) to be interest.[38] Apparently, there are no cases that have dealt with this possibility of stated interest which might be a worthwhile tactic to consider.

There is a possibility that double taxation will result in private annuity situations. The transferee must make the regular payments out of "after tax" dollars, and then the annuitant must pay income tax upon receipt of the payments. This disadvantage can be offset somewhat if

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[31] Note, *supra* note 9, at 934.

[32] CODE § 267; *see* Industrial Trust Co. v. Broderick, 94 F.2d 927 (1st Cir. 1938); Helvering v. Louis, 77 F.2d 386 (D.C. Cir. 1935).

[33] CODE §§ 1245, 1250.

[34] Rev. Rul. 55-119, 1955-1 CUM. BULL. 352.

[35] *Compare* CODE § 1014, *with id.* §§ 1011-12, 1016.

[36] *E.g.*, Estate of Nicholas M. Butler, 18 T.C. 914 (1952). *See also* Rev. Rul. 66-307, 1966-2 CUM. BULL. 429.

[37] Dix v. Commissioner, 392 F.2d 313, 317 (4th Cir. 1968); Kaufman's Inc., 28 T.C. 1179 (1957); Reliable Incubator & Brooder Co., 6 T.C. 919 (1946); Weinberg, *supra* note 9, at 27, 35-36.

[38] Although CODE § 483(f)(5) provides for interest in certain deferred payment situations, apparently it applies only to those situations where no specific amount of interest is designated in the agreement.

the property is depreciable and the transferee takes advantage of the allowable deduction for depreciation.[39]

If the annuitant does not dispose of amounts received in excess of the amount needed for his maintenance, his assets merely will have been converted in form, and his estate size may remain the same. Thus, unless advantage is taken of the gift tax exemptions and exclusions, no estate tax will be saved.[40]

III. Income Taxation of the Transferor

In 1969, the Internal Revenue Service issued Revenue Ruling 69-74,[41] significantly altering the method of taxing private annuities and eliminating some of the income tax benefits existing under prior law. Before reviewing the taxation scheme promulgated in the 1969 ruling, the basis for taxation of private annuities prior to 1969, Revenue Ruling 239,[42] will be discussed in order to aid in the understanding of the Service's position as stated in the 1969 ruling, raising possible grounds for the invalidity of the more recent ruling.[43]

A. Taxation Under Revenue Ruling 239

The adoption by the Service of the open transaction doctrine laid the foundation for the method of taxing private annuities later set forth in Revenue Ruling 239.[44] This doctrine, as stated by the Supreme Court

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[39] Weinberg, *supra* note 9, at 37.

[40] *See* Phillips, *supra* note 1, at 58.

[41] 1969-1 Cum. Bull. 43.

[42] 1953-2 Cum. Bull. 53.

[43] *See* discussion in part V *infra*. Although the exceptions to the general taxation rules of Revenue Rulings 239 and 69-74 will not be discussed in the text of this comment, reference to these exceptions will be made in accompanying footnotes at appropriate times.

[44] 1953-2 Cum. Bull. 53. Exceptions to the application of these rules generally stemmed from the presence of a gift element or the receipt of a private annuity from an organization that issued annuities "from time to time."

If property is transferred for less than adequate consideration, a gift has been made to the extent that the value of the property exceeds the value of the consideration. Code § 2512(b). The transferor in a private annuity transaction will be deemed to have made a gift if the value of the property transferred is greater than the value of the annuity promise and some evidence of an intent to make a gift exists. Beattie v. Commissioner, 159 F.2d 788 (6th Cir. 1947). In taxing payments received in such a case (prior to 1969), the transferor's "investment in the contract" was merely reduced by the amount of the gift, and the normal rules of Revenue Ruling 239 were then applied.

If the transferor receives an annuity from an organization that issues annuities "from time to time," the rules of Revenue Rulings 239 and 69-74 do not apply. Any gain on the transaction is recognized immediately without the benefit of the open transaction doctrine of Revenue Ruling 239 or proration of gains under Revenue Ruling 69-74. Rev. Rul. 62-

in *Burnet v. Logan*,[45] provides that:

> [In a transaction where property is exchanged for] cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty[, t]he promise [is] in no proper sense equivalent to cash. It [has] no ascertainable fair market value. The transaction [is] not a closed one.[46]

Though the *Burnet* case did not deal with private annuities, its principles were extended to cover them by subsequent court decisions.[47] The direct result of the application of these principles was the nonrecognition of any gain at the time of the transfer, and the further postponement of gain recognition until the transferor recovered his basis in the property transferred.[48]

Payments received under an annuity contract include three elements: A return of basis in the property transferred, gain on the exchange, and interest on the annuity contract. The annual payments, therefore, are divided into two parts: The annuity payment (interest on the annuity contract) and the capital payment (that part of each payment attributable to the exchange of property). The proper taxation of payments received throughout the life of the annuity contract could then be determined by a calculation of these two elements and application of Revenue Ruling 239.[49]

1. The Annuity Payment

To determine the annuity portion and, thus, the amount of each payment constituting interest income,[50] the provisions of section 72[51] of the Internal Revenue Code of 1954 were applied. First, the *exclusion*

136, 1962-2 CUM. BULL. 12. *See also* Dix v. Commissioner, 68-1 U.S. Tax Cas. ¶ 9322 (4th Cir. 1968) (discussion of the meaning of the phrase "organizations that issue annuities from time to time").

[45] 283 U.S. 404 (1931). See discussion in text accompanying notes 113 through 118 *infra*.

[46] 283 U.S. at 413.

[47] Commissioner v. Kann's Estate, 174 F.2d 357 (3d Cir. 1949); Hill's Estate v. Maloney, 58 F. Supp. 164 (D.N.J. 1944); Frank C. Deering, 40 B.T.A. 984 (1939); J. Darsie Lloyd, 33 B.T.A. 903 (1936), *acquiesced in*, 1950-2 CUM. BULL. 3.

[48] Rev. Rul. 239, 1953-2 CUM. BULL. 53.

[49] For an example applying the taxation scheme of Rev. Rul. 239, see part *A* of APPENDIX *infra*.

[50] CODE § 72(a).

[51] This section of the Code gives the general rules of taxation applicable to all annuities. Though Revenue Ruling 239 was issued under section 22(b) of the 1939 Code, which differed somewhat from CODE § 72, authorities believed the provisions of Revenue Ruling 239 continued to be applicable under the new Code section.

ratio,[52] the transferor's "investment in the contract"[53] divided by the transferor's "expected return,"[54] had to be computed. Once this ratio was calculated, it was multiplied by the total annual payment made under the annuity agreement.[55] The amount thus obtained was then subtracted from the total payment to determine the amount equal to the annuity payment.[56] This final amount was taxed as ordinary income to the transferor throughout his life.[57]

The computation of the exclusion ratio required the definition of the terms "investment in the contract" and "expected return." Section 72(c)(3) indicated that the "expected return" equalled the transferor's life expectancy[58] multiplied by the total annual payment. The "investment in the contract," however, was not so easily determined.[59] The courts adopted various definitions: Fair market value of the property transferred,[60] the cost of a comparable annuity,[61] and the present value of the transferee's annuity promise.[62] Generally, the "fair market value" definition prevailed, primarily due to the acceptance of this view in Revenue Ruling 239.

2. The Capital Payment

The difference between the total annual payment and the annuity payment, as computed in the preceding section, was deemed attributable to the exchange of the property. This difference, therefore, was

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[52] CODE § 72(b) defines the term "exclusion ratio."

[53] *Id.* § 72(c)(1) defines the term "investment in the contract."

[54] *Id.* § 72(c)(3) defines the term "expected return."

[55] *Id.* § 72(b).

[56] *Id.* § 72(a). Therefore, the amount represented by $\left(\frac{\text{investment in the contract}}{\text{expected return}}\right)$ (annual annuity payment) is excluded from gross income.

[57] *Id.* Since it is interest income, the annuity portion of each annual payment is taxed as ordinary income. *Id.* § 61(a)(4).

[58] *See* Treas. Reg. § 1.72-9, T.D. 6233, 1957-1 CUM. BULL. 32.

[59] CODE § 72 provides that the term equals the "aggregate amount of premiums or other consideration paid . . . ." However, this definition does little to clarify the confusion.

[60] Hill's Estate v. Maloney, 58 F. Supp. 164, 173-75 (D.N.J. 1944) (deciding under section 22 of the 1939 Code what constituted "consideration paid," a term comparable to the "investment in the contract" of CODE § 72); Jane J. de Canizares, 32 T.C. 345, 352-53 (1959). This definition is based on the idea that two transactions have occurred: the sale of the property and the purchase of an annuity.

[61] Maud Gillespie, 43 B.T.A. 399, 405-06 (1941), *rev'd in part*, 128 F.2d 140 (9th Cir. 1942) (defining the term "consideration paid" under section 22 of the 1939 Code). In this case, however, the evidence indicated the presence of a gift element.

[62] Edmund A. Steenburg, 10 P-H/B.T.A. MEM. DEC. ¶ 41,184 (1941) (decided under section 22 of the 1939 Code). Evidence of a gift element was also indicated. *See also* Estate of Lloyd G. Bell, 60 T.C. 469 (1973), in which the transaction was clearly gift-tainted.

considered to be the capital payment.[63] Under the open transaction doctrine, the transferor first recovered his adjusted basis (in the transferred property) tax-free from the capital payments.[64] After the total capital payments received equalled the transferor's adjusted basis in the property, further capital payments were treated as gain from the sale of property.[65] This tax treatment continued until the total capital payments realized equalled the fair market value of the transferred property at the time of transfer.[66] Subsequent capital payments were free from taxation.[67]

3. Summary

This taxation scheme[68] would, therefore, yield several income tax benefits to the transferor. Not only could he defer the recognition of gain on the exchange, he could also recover his basis early in the life of the annuity contract.[69] Even if he did not live to reach his life expectancy, the transferor might receive a return of his adjusted basis. In such instances, all or part of the gain on the exchange of the property might never be taxed. Should he live beyond his life expectancy, the transferor could expect to attain the additional advantage of receiving the subsequent capital payments tax-free.

B. Taxation Under Revenue Ruling 69-74

Contrary to applicable court decisions,[70] the Service in its 1969 ruling reversed its prior position[71] and rejected the application of the open transaction doctrine to private annuities.[72] As a result, the Service now views the annuity promise as capable of immediate valuation and

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[63] CODE § 72(b).

[64] Rev. Rul. 239, 1953-2 CUM. BULL. 53.

[65] *Id.* If the property transferred was a capital asset under CODE § 1221 or an asset in the hands of the transferor under § 1231, the gain recognized was taxable as a capital gain.

[66] Rev. Rul. 239, 1953-2 CUM. BULL. 53. This should coincide with the transferor's attainment of his life expectancy as determined at the time of the transfer.

[67] The tax treatment of capital payments beyond the fair market value of the transferred property was not clear under CODE § 72. However, under section 22 of the 1939 Code, these payments were taxed as ordinary income since, at this point, taxation rules of pure annuities were applied. The extension of this idea (return to pure annuity status) to the present section would leave these payments free of taxation. CODE §§ 72(a)-(b).

[68] For an illustration of this taxation scheme through the use of formulas, see Phillips, *supra* note 1, at 52-53.

[69] A commercial annuitant would have to attain his life expectancy before recovering his entire investment. CODE §§ 72(a)-(c).

[70] *See* cases cited note 47 *supra*.

[71] Rev. Rul. 239, 1953-2 CUM. BULL. 53; *see* part III(*A*) *supra*.

[72] Rev. Rul. 69-74, 1969-1 CUM. BULL. 43.

requires the gain realized on the exchange to be determined at the time of the transfer.[73] The entire gain, however, need not be recognized at the time of the transfer but may be prorated, along with the transferor's basis, over his life expectancy.[74] Under Revenue Ruling 69-74, then, each annual annuity payment consists of a pro rata return of the transferor's adjusted basis, a pro rata share of the gain from the exchange, and interest on the annuity contract. For purposes of setting out the method of taxing these payments under the 1969 ruling, each annual payment is divided into two parts representing the excluded portion and the included portion.[75]

1. The Excluded Portion

Computation of the excluded portion is determined under section 72 of the Code by a method similar to that applied under Revenue Ruling 239. First, the exclusion ratio is calculated by dividing the transferor's "investment in the contract" by his "expected return."[76] This ratio is then multiplied by the amount of the annual annuity payment to obtain the portion of each payment that will be excluded from income for the term of the transferor's life.[77]

Again, for purposes of computing the exclusion ratio above, the transferor's "expected return" from the contract equals the annual annuity payment multiplied by the transferor's life expectancy.[78] Unlike Revenue Ruling 239, however, the 1969 ruling concludes that the transferor's "investment in the contract" is his adjusted basis in the property transferred.[79] Consequently, the transferor will recoup his adjusted basis in the property pro rata over his life expectancy (as determined at the

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[73] *Id.* The presence of a gift element or the receipt of a private annuity from an organization that issues annuities "from time to time" creates an exception.

If a gift has been made, the transferor's gain on the exchange will be reduced by the difference between the value of the property transferred and the present value of the annuity contract (*i.e.*, the gift element). *See* CODE § 2512(b). The normal rules of Revenue Ruling 69-74 will then be applied.

If transferor has received an annuity from an organization that issues annuities "from time to time," the taxation rules of Revenue Rulings 69-74 and 239 do not apply. Gain on the transaction is recognized immediately. Rev. Rul. 62-136, 1962-2 CUM. BULL. 12. See discussion with reference to exceptions to Rev. Rul. 239 in note 44 *supra*.

[74] Rev. Rul. 69-74, 1969-1 CUM. BULL. 43. The arrangement thus adopted is similar to installment sales provisions in CODE § 453.

[75] For an example applying the taxation scheme of Rev. Rul. 69-74, see part (*B*) of APPENDIX *infra*.

[76] CODE § 72(b).

[77] *Id.*; *see* note 56 *supra*.

[78] CODE § 72(c)(3).

[79] Rev. Rul. 69-74, 1969-1 CUM. BULL. 43. *See generally* cases cited notes 60 through 62 *supra*.

time of the transfer). If he lives beyond his life expectancy, the transferor will continue to recover the excluded portion tax-free.[80]

2. The Included Portion

The remainder of each annuity payment is includable in the transferor's income[81] and is, in turn, divided into two parts: The capital gain portion (assuming a capital asset has been transferred) and the annuity portion (interest on the annuity contract). The gain portion of each payment is simply the transferor's gain from the exchange of the property divided by the transferor's life expectancy.[82] Under the open transaction theory of Revenue Ruling 239, the transferor's gain could not be calculated at the time of the transfer since the transferee's promise was thought to be incapable of valuation.[83] Revenue Ruling 69-74 rejects this contention[84] by requiring the use of certain tables for the present valuation of private annuity contracts.[85] This value minus the transferor's adjusted basis constitutes the transferor's gain from the exchange.[86] If a capital asset has been transferred,[87] the pro rata share of this gain will be taxed as capital gain. Once the entire gain is recovered (the transferor has reached his life expectancy), the gain portion of subsequent payments will be taxed as ordinary income.[88]

The included portion of each annual payment minus the gain portion equals the annuity payment. Since this amount is interest on the annuity contract, it is taxed as ordinary income throughout the transferor's life.[89]

3. Summary

If the transferor lives, exactly, to his life expectancy as determined

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[80] *See* CODE § 72, excluding this portion of payments for the life of the contract.

[81] *Id.* § 72(a).

[82] Rev. Rul. 69-74, 1969-1 CUM. BULL. 43.

[83] Part V(*A*) *infra* and cases cited in note 47 *supra*.

[84] 1969-1 CUM. BULL. 43.

[85] Treas. Reg. §§ 20.2031-10(f), 25.2512-9(f) (1970) (Tables A(1)-(2)).

[86] Rev. Rul. 69-74, 1969-1 CUM. BULL. 43.

[87] CODE §§ 1221, 1231.

[88] *Id.* § 72(a). This provides for the inclusion in transferor's gross income of those amounts not excluded under section 72(b). Since only the portion of each payment attributable to the transferor's adjusted basis is so excluded, the gain portion of each annual payment continues to be taxed after the entire gain has been recouped. Also, see the discussion on the controversy as to the transferor's "investment in the contract," part V(*B*) *infra*.

Revenue Ruling 69-74 does not set forth the method of recapturing depreciation in the case of depreciable property from the gain portion of annual payments and leaves this problem open to speculation. *See* CODE §§ 1245, 1250 (recapture provisions).

[89] CODE § 61(a)(4).

at the time of the transfer, taxes paid under the taxation scheme of Ruling 69-74[90] will be essentially the same as those paid under the prior taxation scheme. The only significant difference is the timing of that taxation. If the transferor does not attain his life expectancy, he will not recover his entire investment (his adjusted basis in the property transferred). Yet, he will pay taxes on gain from the transaction. By living beyond his life expectancy, the transferor will suddenly have the burden of paying taxes at ordinary income rates on the portion of payments formerly taxable as gain from the exchange of the property.

C. Major Differences Between Revenue Ruling 69-74 and Revenue Ruling 239

Although the amount of taxes paid under the two methods, in most cases, would be comparable,[91] Revenue Ruling 69-74 represents a major departure from prior law in two areas: The rejection of the open transaction doctrine, and the equating of the adjusted basis of the property transferred to the transferor's investment in the contract. The adoption of these two practices significantly reduces the income tax advantages formerly available through private annuity arrangements.

Under prior law, the transferor could be assured of recouping his adjusted basis before paying any tax other than that due on the interest attributable to the annuity contract.[92] The advantage to the transferor who lived to his life expectancy was the postponement of gain recognition. The transferor who failed to reach his life expectancy was aided by the nonrecognition of all or part of the gain from the exchange. Rejection of the open transaction doctrine by the recent ruling, however, leads to the immediate determination of the transferor's gain and immediate recognition of a portion of that gain. Though the thrust of the proration scheme of Revenue Ruling 69-74 is consistency of taxation over the period of the transferor's life expectancy,[93] the ruling eliminates the advantage of postponement and creates the possibility that gain not actually received will be taxed.[94]

Formerly, a transferor who exceeded his life expectancy could obtain the added advantage of receiving the capital portions of subsequent

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[90] For an illustration of this taxation scheme through the use of formulas, *see* Phillips, *supra* note 1, at 54.

[91] *See* B. Ellis, *supra* note 4, at A-7 to -8 for a factual situation comparing the two methods of taxation.

[92] Rev. Rul. 239, 1953-2 Cum. Bull. 53; *see* part III(*A*) *supra*.

[93] The transferor will be paying taxes on the same amounts throughout his life expectancy. Rev. Rul. 69-74, 1969-1 Cum. Bull. 43.

[94] If the transferor dies before reaching his life expectancy, he has not actually gained the amount that has been taxed as capital gain since he has not recovered his entire investment.

annual payments tax-free.[95] For a long-lived annuitant, this could prove to be a windfall. By adopting the adjusted basis in the property transferred as the transferor's investment in the contract, Revenue Ruling 69-74 effectively removes this advantage, causing the capital portion of annual payments to be included in transferor's gross income.[96] Only that portion of subsequent payments attributable to the transferor's adjusted basis in the property will be excluded from gross income. The taxation burden created by the annuity is thus increased by the taxation of these payments as ordinary income. For an annuitant with little or no other income, this result can be disastrous.

IV. Income Taxation of the Transferee

Tax problems for the transferee revolve around two distinct questions: (1) Determination of the basis in the transferred property for computing gain or loss on its subsequent sale, and (2) determination of the basis in the property for purposes of depreciation. Cases attempting these determinations have employed various theories. Some have advocated the "capital expenditures" theory, holding that the transferee's basis equalled the sum of all payments actually made by a certain date.[97] Others recognized the "annuity venture" and held that the transferee's basis is the value of the annuity promise as of the date of the transfer.[98] Revenue Ruling 55-119,[99] in its attempt to settle the controversy, reached a middle ground between the two theories.

A. Basis for Depreciation

For the purpose of computing depreciation, the transferee's basis equals the present value of the annuity promise.[100] When the payments actually made exceed this value, the additional payments are added to the basis, requiring new calculations of the proper depreciation deduction each year.[101] As a result, the depreciation deduction will become larger in later years.

B. Basis for Computing Gain or Loss from the Sale of the Property

The basis in the property for purposes of computing gain or loss

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[95] *See* discussion in note 67 *supra*.

[96] 1969-1 Cum. Bull. 43.

[97] *E.g.*, D. Bruce Forrester, 4 T.C. 907 (1945).

[98] *E.g.*, Commissioner v. Moore Corp., 42 F.2d 186 (2d Cir. 1930).

[99] 1955-1 Cum. Bull. 352. Revenue Ruling 69-74 has no bearing on the tax treatment of the transferee.

[100] *Compare* Code §§ 1011-16, *with* Rev. Rul. 55-119, 1955-1 Cum. Bull. 352. In computing the present value of the annuity promise, see Treas. Reg. §§ 20.2031-10(f), 25.2512-9(f) (1970) (Table A(1)-(2)).

[101] Rev. Rul. 55-119, 1955-1 Cum. Bull. 352.

equals the total payments made if the property is sold after the transferor's death.[102] If the property is sold prior to that time, the transferee's basis for determining gain is the total of payments made as of the date of the sale plus the present value of future payments.[103] The basis for determining loss is merely the total of payments made as of the date of sale.[104] The sale price of the property possibly could exceed the basis for loss without exceeding the basis for gain. In this situation neither gain nor loss would be recognized.[105]

Because of these rules, the transferee may recognize additional gain or loss many years after the actual sale of the property. If the transferee recognized gain at the time of the sale, additional payments made in excess of his basis will become a deductible loss.[106] If the total payments actually made to the transferor during his life do not equal the transferor's basis, the transferee who recognized gain on the sale has additional income in the year of the transferor's death.[107] If the transferee recognized a loss at the time of the sale, each subsequent payment made after the sale is a deductible loss.[108] Should the transferee have recognized neither gain nor loss at the time of the sale, subsequent payments will be deductible only to the extent they exceed the amount realized from the sale.[109]

Revenue Ruling 55-119 further states that the character of gains and losses recognized in later years will be determined with reference to the character of the underlying transaction.[110] Therefore, in most

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[102] *See* D. Bruce Forrester, 4 T.C. 907 (1945). *See also* Citizens Nat'l Bank v. Commissioner, 122 F.2d 1011 (8th Cir. 1941).

[103] Rev. Rul. 55-119, 1955-1 CUM. BULL. 352. This ruling provides that in a part-annuity, part-gift transaction, the transferee will have two separate bases for the property—a basis for the gift and a basis for the property received for the annuity. However, this rule may be changed by a 1957 regulation which states that, in any part-sale, part-gift transaction, the transferee's basis in the property acquired will be the greater of the amount paid for the property or the transferor's basis. Treas. Reg. § 1.1015-4 (1957). Thus, in the private annuity transaction involving a gift element, the transferee's unadjusted basis for gain would be the greater of the amount paid by the transferee or the transferor's basis plus any increase in basis allowed under CODE § 1015(d) for gift tax paid.

[104] Rev. Rul. 55-119, 1955-1 CUM. BULL. 352. In a part-annuity, part-gift transaction, the transferor's basis for determining loss, under Treas. Reg. § 1.1015-4 (1957), may not exceed the fair-market value of the property at the time of its exchange. See discussion in note 103 *supra* concerning the application of this regulation to private annuities.

[105] Rev. Rul. 55-119, 1955-1 CUM. BULL. 352.

[106] *Id.* This rule is subject to Code provisions on the nondeductibility of certain losses. CODE § 165.

[107] Rev. Rul. 55-119, 1955-1 CUM. BULL. 352.

[108] *Id.* However, deductibility is subject to CODE § 165.

[109] Rev. Rul. 55-119, 1955-1 CUM. BULL. 352. Again, deduction will be determined according to the rules of CODE § 165.

[110] The ruling thus applies the principle of Arrowsmith v. Commissioner, 344 U.S. 6 (1952).

instances, gain or loss will be treated as capital gain or loss since the property transferred in a private annuity transaction is usually a capital asset.[111]

V. VALIDITY OF THE TAX TREATMENT OF THE TRANSFEROR UNDER REVENUE RULING 69-74

Revenue Ruling 69-74 represents a reversal of previous law with respect to certain aspects of the income taxation of the transferor.[112] The significance of the 1969 changes has brought into question the validity of both the rejection of the open transaction doctrine and the determination of the transferor's basis in the contract.

A. The Open Transaction Doctrine and Validity of Its Rejection in Revenue Ruling 69-74

The open transaction doctrine was created in 1931 by the Supreme Court in *Burnet v. Logan*.[113] This case dealt with the exchange of stock in a mining company for a certain sum of money plus the transferee's promise to pay a fixed amount for each ton of ore mined.[114] Although the transferee had no obligation to conduct mining operations, the Commissioner valued the promise by estimating the amount of ore in the mine and discounting the royalties payable on that amount.[115] Rejecting the action of the Commissioner, the Supreme Court concluded that the transferee's promise could not be valued because of the highly speculative nature of the amount to be paid by the transferee.[116]

The practical importance of the open transaction doctrine is that the general taxation rules of immediate valuation of the consideration received and inclusion of any gain in gross income,[117] ordinarily applicable to the sale or exchange of property, do not apply. The transferor of property is thereby allowed to recover his entire basis in the property out of the payments received before reporting any gain from the transaction.[118]

In 1936, the Board of Tax Appeals extended the open transaction

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The character of gains may be altered by the rules of the recapture of depreciation provisions of the Code. *See* CODE §§ 1245, 1250-52 (all or part of the gain may be treated as ordinary income). *See also id.* § 47.

[111] *See* CODE §§ 1221, 1231.

[112] *Compare* discussion in part III(*A*) *supra, with* discussion in part III(*B*) *supra*.

[113] 283 U.S. 404 (1931).

[114] *Id.* at 409-10.

[115] *Id.* at 411.

[116] *Id.* at 412-14.

[117] CODE §§ 1001-02.

[118] Burnet v. Logan, 283 U.S. 404, 413 (1931); Rev. Rul. 239, 1953-2 CUM. BULL. 53.

doctrine to private annuities in *J. Darsie Lloyd*.[119] Applying the *Burnet* decision, it was held that the transferee's promise was incapable of valuation.[120] Unlike the situation in commercial annuities, the court reasoned, the ability of the transferee in a private annuity transaction to make future payments at the appointed times is wholly uncertain.[121]

Since *Lloyd*, the courts have uniformly applied the open transaction doctrine in private annuity arrangements.[122] Unjustifiably, these cases have found the speculative nature of a private annuity promise to be similar to that of the transferee's promise in *Burnet*. The amount of the annual payments to be made under an annuity contract is fixed; only the length of time that payments will be made and the certainty of whether the transferee will make those payments are in question. *Burnet*, therefore, is sufficiently distinguishable since uncertainty in the amount of payments caused the Court to find the contract incapable of valuation, affording the transferor the benefits of the open transaction doctrine.[123] The length of time that payments will be made can be predicted by use of actuarial tables. The uncertainty of the payments being made is present in all deferred payment transactions and should have no bearing on the question of whether the payments are too speculative. Furthermore, the courts have not looked to the financial ability of a transferee to support their conclusions but have stated that private annuities cannot be valued as "a rule of law, independent of actual proof of the financial capacity."[124]

A more reasonable basis for holding a private annuity promise to be incapable of valuation might be found in the approach taken by the deferred payment cases.[125] Rejecting the idea that all deferred payment

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[119] 33 B.T.A. 903, *not acquiesced in*, XV-2 CUM. BULL. 39 (1936), *nonacquiescence withdrawn and acquiesced in*, 1950-2 CUM. BULL. 3.

[120] 33 B.T.A. at 905.

[121] *Id.*

[122] *E.g.*, Commissioner v. Kann's Estate, 174 F.2d 357 (3d Cir. 1949); Hill's Estate v. Maloney, 58 F. Supp. 164 (D.N.J. 1944); Bella Hommel, 7 T.C. 992 (1946); Frank C. Deering, 40 B.T.A. 984 (1939). *But see* Guaranty Trust Co., 15 B.T.A. 20 (1929).

[123] Not only did payments depend on the amount of ore present but also on the fact that the transferee had no obligation to mine the ore. 283 U.S. at 409.

[124] Estate of Kann, 6 CCH Tax Ct. Mem. 913, 914 (1947), *aff'd*, 174 F.2d 357 (3d Cir. 1949). *See also* J. Darsie Lloyd, 33 B.T.A. 903 (1936), *acquiesced in*, 1950-2 CUM. BULL. 3.

[125] In a deferred payment transaction, a note is accepted in exchange for property. Gain is recognized at the time of the transfer to the extent that the fair market value of the note exceeds transferor's adjusted basis in the property. Since the fair market value of the note will generally be less than its face amount, the question remains as to the proper method of taxing this additional income (difference between the fair market value of the note at the time of the transfer and its face amount). Generally, this income is prorated as the obligor makes payments. CODE § 453 (installment sales plan).

However, some courts have utilized a "speculativeness" test which would allow recov-

transactions are speculative, one decision fashioned the following test to determine the amount of uncertainty necessary in each case in order to allow recovery of basis before recognition of gain:

> [W]hether, at the time of acquisition, the person acquiring the obligation (whether by purchase or otherwise) cannot be reasonably certain that he will recover his cost and a major portion of the discount [is the determinative factor]. We believe it is not essential to the ultimate test that the major portion of the discount, which may be reasonably certain to be recovered, be determined precisely. It should be sufficient to make a broad finding in this regard.[126]

Similarly, private annuities could be subjected to a case-by-case analysis of the degree of uncertainty present.

A cash-basis taxpayer[127] might also argue that he has received a mere contractual promise to pay—which is not the equivalent of cash.[128] He has not, therefore, realized any gain from the sale and will not realize any until his basis is recovered. This argument would be particularly persuasive due to the lack of security interests in most private annuity arrangements.[129]

Regardless of the propriety of applying the open transaction doctrine to the private annuity, its rejection in Revenue Ruling 69-74 has little support in prior case law and statutory provisions.[130] Repeatedly, the Service sought, without success, legislation treating the private annuity arrangement as a closed transaction.[131] The rejection of the Service's position suggests that the provisions of Revenue Ruling 69-74

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ery of the transferor's basis in the note (fair market value of the note at the time of the transfer) before the payment of tax on the additional income. *E.g.*, Wingate E. Underhill, 45 T.C. 489 (1966).

[126] Wingate E. Underhill, 45 T.C. 489, 495 (1966).

[127] *See* CODE § 446(c) (permissible methods of reporting taxable income).

[128] Bedell v. Commissioner, 30 F.2d 622, 624 (2d Cir. 1929); Harold W. Johnston, 14 T.C. 560 (1950); *see* Cowden v. Commissioner, 289 F.2d 20, 24 (5th Cir. 1969) (treating the marketability of the property received (note) as the determinative factor).

[129] The retention of a security interest could cause the entire gain from the transaction to be recognized in the year of the transfer. *See* Estate of Lloyd G. Bell, 60 T.C. 469 (1973). Also, the value of the property may be included in the transferor's gross estate due to the presence of the security interest. Tips v. Bass, 21 F.2d 460 (W.D. Tex. 1927) (property placed in trust to secure payments); CODE § 2037 (transfers intended to take effect at death).

[130] *See* cases cited note 122 *supra*. Note that the one case to the contrary was decided prior to *Burnet*.

[131] H.R. REP. NO. 1337, 83d Cong., 2d Sess. § 1241 (1954). The Service also issued rulings limiting the application of the open transaction doctrine. Rev. Rul. 68-183, 1968-1 CUM. BULL. 308 (private annuity transaction between a trust and a transferor who is the grantor of the trust); Rev. Rul. 62-136, 1962-2 CUM. BULL. 12 (dealing with private annuities received from organizations that issue annuities "from time to time").

which require a pro rata recognition of the gain might not be upheld in future court decisions.

B. Determination of Transferor's Investment in the Contract

If he lives beyond his life expectancy, the transferor, under Revenue Ruling 69-74, is suddenly faced with the burden of recognizing the capital portion of annual annuity payments as ordinary income.[132] This portion would not have been included in the transferor's income, at this time, under Revenue Ruling 239.[133] The different result under Revenue Ruling 69-74 is attributable to the definition of the transferor's "investment in the contract" as his adjusted basis in the transferred property rather than the fair market value of such property.[134]

In defining the term "investment in the contract," section 72 of the Code gives no real clue to the intended meaning of the term in private annuity arrangements. Section 72(c)(1) merely states that the investment in the contract is "the aggregate amount of premiums or other consideration paid for the contract." Whether this definition includes the difference between the adjusted basis and the fair market value of the property transferred is not specifically determined by the Code.

To support the interpretation of Revenue Ruling 239 which equates investment in the contract with the fair market value of the property transferred, the transferor might argue that at the time he reaches his life expectancy the private annuity transaction is analogous to an annuity purchased for cash. In this type of transaction, the transferor's investment in the contract would clearly be the amount of cash paid for the annuity, which would equal its present value.[135] Under section 72(b), the cash annuitant thus excludes from his gross income for the life of the annuity contract that part of each annual annuity payment attributable to the consideration he has paid for the annuity. The same treatment might be applied to the private annuity arrangement by viewing it as a dual transaction: the sale of property at its fair market value and the purchase of the annuity with the cash proceeds.[136] A significant distinction between the two situations, however, is that the cash annui-

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[132] *See* discussion in part III(*B*)(2) *supra*.

[133] *See* discussion in part III(*A*) *supra*.

[134] *Compare* Rev. Rul. 69-74, 1969-1 CUM. BULL. 43, *with* Rev. Rul. 239, 1953-2 CUM. BULL. 53.

[135] CODE § 72(c)(1).

[136] *See* John C. Moore Corp., 15 B.T.A. 1140, 1143, *not acquiesced in*, VIII-2 CUM. BULL. 69 (1929), *aff'd*, 42 F.2d 186, 189 (2d Cir. 1930) (dictum). *See generally* Jane J. de Canizares, 32 T.C. 345 (1959); Rev. Rul. 239, 1953-2 CUM. BULL. 53, both implying the acceptance of such an idea by equating the "investment in the contract" to the fair market value of the property transferred.

tant purchases his annuity with after-tax dollars[137] whereas the private annuitant recognizes his gain on the property transferred over the period of his life expectancy. Yet, once the private annuitant reaches his life expectancy, the entire gain will have been taxed under both Revenue Rulings 239 and 69-74.[138] Therefore, the only real difference in the two situations is the advantageous timing of taxation afforded the private annuitant.

Furthermore, the provisions of Revenue Ruling 69-74 seem to have been rejected by a recent regulation issued by the Service.[139] This regulation, which illustrates the tax consequences of the transfer of property to a charity for a private annuity, uses the value of the property transferred as the transferor's investment in the contract and concludes that the portion of each annual annuity payment attributable to gain on the property will not be taxed after the transferor reaches his life expectancy. The regulation thus reaches a result comparable to that achieved by application of Revenue Ruling 239 and seemingly rejects the position of Revenue Ruling 69-74.[140]

If the interpretation of Revenue Ruling 69-74 prevails as to the meaning of "investment in the contract," the tax liability of the private annuitant will significantly increase when he reaches his life expectancy because of the taxation of the capital portion of the annual payments as ordinary income. Such a result seems inconsistent with the indicated purpose of section 72 of the Code. By providing a constant exclusion ratio throughout the life of the annuitant, the section seeks a more uniform tax treatment of the payments received under an annuity contract.[141]

CONCLUSION

Despite questions raised concerning the proper method of taxing payments received under a private annuity arrangement, estate planners should not overlook the private annuity as a method of securing favorable estate, gift, and income tax consequences as well as other lifetime objectives of the transferor. As with any estate-planning tool, the selection of a private annuity for use in a comprehensive estate plan

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[137] The cash annuitant has sold his property, recognized the gain on the sale, and then purchased an annuity with the remaining cash proceeds.

[138] *See* discussion in parts III(*A*)-(*B*) *supra*.

[139] Treas. Reg. § 1.1011-2(c), Example (8) (1972).

[140] The example deals with a private annuity issued by a charity. However, the regulation does not seem to be limited to the private annuity transaction in which the transferee is a charity.

For an analysis of the regulation and its relation to Rev. Rul. 69-74, see Stewart, *supra* note 1.

[141] CODE § 72(b).

merely requires a careful weighing of its advantages and disadvantages in each particular fact situation.

During the life of the transferor the properly executed private annuity arrangement can successfully accomplish a variety of estate-planning objectives: The transfer of management responsibilities from the transferor to someone designated by the transferor; the shift of income from the higher tax bracket of the transferor to the lower tax bracket of the transferee; the utilization of both capital and income to create an annual income for the remainder of the transferor's life; the securing of an annual income by transferring non-income producing property; the diversification of a transferor's investments; the sale of stock in a closely held corporation to a family member or business associate who could not afford a lump sum purchase; the removal of the property from transferor's estate; and the inter vivos transfer of property without gift tax consequences. Inherent in the private annuity transaction, however, are certain disadvantages that may frustrate the above objectives: The lack of security for the transferred property should the transferee fail to tender the future payments; the possibility that the transferor may die before reaching his life expectancy without recovering the full value of the property transferred; the inclusion of all undisposed annuity payments in the transferor's gross estate; the uncertainty of the transferee's basis in the property caused by the indeterminable nature of the transferor's life expectancy; and the economic problems of living on a fixed income during inflationary trends.

If he finds the transferor's objectives can be accomplished by the private annuity, the estate planner should proceed to compare the estate, gift, and income tax consequences of the private annuity with other methods of transferring the property. When these comparisons establish that the use of a private annuity would be advantageous, the supposed complexity of such an arrangement should not be an excuse for its nonuse by the estate planner.

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APPENDIX

A. *Example Applying the Taxation Rules of Revenue Ruling 239*

The following example, given in Revenue Ruling 239, illustrates the taxation scheme of the ruling under the 1939 Internal Revenue Code. Any differences in the application of the ruling under the 1954 Code are set out in italics.

> In the instant case, the taxpayer transferred certain real property valued at $40,000 in consideration of the agreement of the purchaser, an individual, to pay her $2,000 per year for the remainder of her life and after her death to make similar payments to her daughter for life. The adjusted basis of the property at the time of the transfer was $5,600. The evidence does not indicate that any part of the property was transferred as a gift.
>
> In the instant case it is held that the payments received under the contract constitute annuity payments under section 22(b)(2) of the [1939] Code, for which the "consideration paid" is the fair market value of the real property at time of the transfer. Accordingly, the annual payments of $2,000 constitute ordinary income to the extent of 3 percent of the fair market value of the real property (3 percent of $40,000 = $1,200) at the time of the transfer until the aggregate of that portion of the payments which is not taxed under section 22(b)(2) of the Code ($800 per annum) equals the fair market value of the property transferred. After such time the payments are taxable in full as ordinary income. [*Under the 1954 Code, application of the rules of Revenue Ruling 239 would require that the fair market value of the property, $40,000, be divided by the expected return on the annuity contract, $2,000 per year multiplied by the life expectancy of the annuitant. If the life expectancy of the annuitant were, for example, 50 years, the ratio thus obtained would be 2/5 or 40 percent. This ratio multiplied by the annual payment of $2,000 would equal $800. By subtracting this amount from the annual payment, $2,000, the amount of the annuity payment could be calculated. In this example, then, $1,200 would be treated as the annuity portion and taxed as ordinary income for the life of the annuity contract.*] It is further held that after the total of that part of the annuity payments which is not taxed under section 22(b)(2) of the Code equals the adjusted basis of real property ($5,600), subsequent payments, to the extent that they exceed 3 percent of the fair market value of the property, are taxable as gain from the sale of such property until the total of the payments so taxed equals the excess of the fair market value of the property at the time of the transfer over the adjusted basis thereof. [*Similarly, under the 1954 Code, (utilizing 50 years as the life expectancy of the annuitant) the taxpayer would recover her adjusted basis of $5,600 from the $800 per annum not taxed as annuity payments. Thereafter, the amount of $800 per annum would be taxed as gain from the sale of the property until the total of such payments equalled the difference between the fair-market value of the*

> *property at time of transfer and its adjusted basis.*] During the first 50 years $1,200 (3 percent of $40,000) of each annual payment of $2,000 is taxable as ordinary income under section 22(b)(2) of the Code. The remaining $800 of each annual payment is excludable from gross income during the first 7 years such payments are received. In the 8th to 50th years, inclusive, $800 of each annual payment is includible in gross income subject to the capital gains provisions of section 117 of the Code. After the 50th year the full annuity payment of $2,000 per year is taxable as ordinary income. [*Under the 1954 Code, at this point only $1,200 would be taxed as ordinary income; the remaining $800 would be recovered tax-free.*]

Rev. Rul. 239, 1953-2 CUM. BULL. 53-54.

B. Example Applying the Taxation Rules of Revenue Ruling 69-74

The following example, given in Revenue Ruling 69-74, illustrates the taxation scheme of the ruling.

> In the instant case, the taxpayer, age 74, transferred property (a capital asset) having an adjusted basis of $20,000, and a fair market value of $60,000, to his son in 1966, in exchange for the legally enforceable promise of the latter to pay him a life annuity of $7,200 per annum payable in equal monthly installments of $600.
>
> Section 72(b) of the Internal Revenue Code of 1954 provides that gross income does not include that part of any amount received as an annuity which bears the same ratio to such amount as the investment in the contract bears to the expected return under the contract. Further, section 1.72-3 of the Income Tax Regulations states that amounts received under annuity contracts are not to be included in the income of the recipient to the extent that such amounts are excludable from gross income as the result of the application of section 72 of the 1954 Code and the regulations thereunder.
>
> Accordingly, the tax consequences of the private annuity transaction in this case are determined by applying the following principles:
>
> (1) The gain realized on the transaction is determined by comparing the transferor's basis in the property with the present value of the annuity. Section 1.101-2(e)(1)(iii)(b)(3) of the regulations prescribes the appropriate table to be used for valuing a private annuity contract. (U.S. Life Table 38 contained in paragraph (f) of section 20.2031-7 of the Estate Tax Regulations) The gain realized will be capital gain if the transferred property constitutes a capital asset.
>
> (2) The excess of the fair market value of the property transferred over the present value of the annuity acquired constitutes a gift for Federal gift tax purposes where the transaction is not an ordinary business transaction within the meaning of sections 25.2511-1(g)(1) and 25.2512-8 of the Gift Tax Regulations.
>
> (3) The gain should be reported ratably over the period of years measured by the annuitant's life expectancy and only from that portion

of the annual proceeds which is includible in gross income by virtue of the application of section 72 of the 1954 Code. This will enable the annuitant to realize his gain on the same basis that he realizes the return of his capital investment.

(4) The investment in the contract for purposes of section 72 of the 1954 Code is the transferor's basis in the property transferred. Since the amount of the gain is not taxed in full at the time of the transaction, such amount does not represent a part of the "premiums or other consideration paid" for the annuity contract. Applying the foregoing principles, the transaction in the instant case is taxable as follows:

(1) Based on U.S. Life Table 38, with interest at 3½ percent [current tables use 6 percent], the present value of the right of a person age 74 to recieve [*sic*] a life annuity of $7,200 per annum is $47,713.08.

(2) The excess of the fair market value of the property transferred over the value of the annuity received as a gift to the son from the father. ($60,000 minus $47,713.08 is $12,286.92, the gift made by the father to his son.)

(3) The basis of the property is $20,000.

(4) The excess of the value of the annuity received over the basis in the property transferred represents the gain realized. ($47,713.08 minus $20,000 is $27,713.08 the gain realized.) See section 1.1001-1(e)(1) of the Income Tax Regulations.

(5) The computation and application of the exclusion ratio, the gain, and the ordinary annuity income is as follows:

$72,700 expected return (annual proceeds multiplied by 10.1, the life expectancy).

$20,000 (investment in the contract) divided by $72,720 (expected return) results in an exclusion ratio of 27.5 percent.

(a) Annual proceeds, $7,200.

(b) Exclusion (27.5 percent of $7,200), $1,980.

(c) Capital gain income ($27,713.08) divided by 10.1 years (the life expectancy), $2,743.87.

(d) Ordinary annuity income: (a) minus the total of (b) plus (c), $2,476.13.

The exclusion ratio of 27.5 percent is applicable throughout the life of the contract. After the capital gain of $27,713.08 has been fully reported, subsequent amounts received (after applying the exclusion ratio) are to be reported as ordinary income.

Rev. Rul. 69-74, 1969-1 CUM. BULL. 43-44.

RECENT DECISIONS

Constitutional Law—Due Process—Right to Treatment for Nondangerous Involuntarily Civilly Committed Persons

Appellee, a former mental hospital patient[1] who had been civilly confined to a hospital for 14 years[2] on *parens patriae*[3] grounds, brought an action seeking damages[4] under the fourteenth amendment[5] and section 1983[6] against his attending physicians.[7] Appellee contended that he possessed a constitutional right to be treated for his illness or to be released from the hospital, and alleged[8] that

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[1] Appellee was diagnosed to be a "paranoid schizophrenic."

[2] Appellee was committed to the Florida State Hospital at Chattahootchie in 1957 upon the petition of his father and after a hearing before a county judge. He was released after he instituted this suit in 1971.

[3] Civil commitment is based either upon the protective police power or the *parens patriae* power of the state. The *parens patriae* doctrine is founded upon the individual's need for care and treatment and his inability to decide for himself concerning hospitalization. This is to be distinguished from the police power rationale which is based on the patient's danger to himself and others. *See* Note, *The Nascent Right to Treatment*, 53 Va. L. Rev. 1134, 1138-39 (1967). *See also* Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 Mich. L. Rev. 945, 954-60 (1959); Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190 (1974); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 Harv. L. Rev. 1288 (1966). Fifteen states permit commitment only if the person is mentally ill and dangerous to himself and others or is unable to care for himself. Fourteen states allow commitment if the person is in need of treatment (twelve of these require that the patient be unable to judge the need for his treatment). In seven states there is a requirement that commitment be necessitated by reasons of public welfare, while the rest require the need for treatment of mental illness. Note, *Developments in the Law, supra* at 1203-04.

[4] The suit was originally brought as a class action by the appellee on behalf of all the patients in his hospital ward, seeking damages and habeas corpus for the release of himself and of the class, and seeking also an injunction requiring the hospital to provide treatment. The class action suit and prayer for injunctive relief were dismissed after appellee was released.

[5] U.S. Const. amend. XIV, § 1.

[6] 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[7] Appellee originally named five defendants in his suit. Judgments were rendered against the two attending physicians bringing the appeal, but the others, state mental health officials, had favorable verdicts returned.

[8] Appellee specifically alleged that appellants intentionally confined him against his will, knowing that he was receiving little or no treatment, and that this limited treatment would result in an extended period of hospitalization.

his constitutional right to due process of law had been violated by intentionally prolonged confinement[9] and limited treatment.[10] Appellants denied the existence of any right to treatment for patients involuntarily civilly committed to state mental hospitals. The district court agreed with appellee, adding that it is unconstitutional to prolong confinement of a patient, without treatment, who is harmful neither to himself nor to others.[11] On appeal to the Court of Appeals for the Fifth Circuit, *held*, affirmed. Where a nondangerous patient is involuntarily civilly committed to a state mental hospital, there is a constitutional right to receive treatment as will accord a reasonable opportunity to be cured or to improve the patient's mental condition. *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir.), *cert. granted*, 95 S. Ct. 171 (1974) (No. 74-8).

By an expansion of due process[12] and through a judicial response to the deficiencies inherent in mental institutions[13] a constitutional right to treatment

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[9] During appellee's hospitalization appellants blocked all efforts made by responsible parties to secure his release to their custody.

[10] Evidence showed that three forms of treatment were withheld from appellee: grounds privileges, occupational therapy, and, most importantly, personal psychiatric treatment. Appellee's requests for the first two were persistently denied. Being a Christian Scientist, he refused medication or electrical shock treatments; other than these, no other therapy was offered except allowing appellee to attend church and engage in recreational activities. In addition, appellee was incarcerated in crowded quarters which were left unprotected from criminal patients in the ward.

[11] This is taken from the trial judge's jury instructions.

[12] Justice Frankfurter, dissenting in Solesbee v. Balkcom, 339 U.S. 9, 16 (1950), described due process in relation to mental health:

> Due process is that which comports with the deepest notions of what is fair and right and just . . . . In applying such a large . . . concept as "due process," the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions.

[13] Sixty-nine percent of the mental health services in the United States are public facilities. NATIONAL INSTITUTE OF MENTAL HEALTH, MENTAL HEALTH STATISTICS: UTILIZATION OF MENTAL HEALTH FACILITIES 8 (1971). In 1972, 404,000 patients were admitted to state mental health institutions. Of these, 41.8 percent were involuntarily civilly committed. Another 1.5 percent were transferred from prison, and 2.3 percent were admitted because of incompetency to stand trial. The remainder were voluntary and nonprotesting admissions. Note, *Developments in the Law, supra* note 3, at 1193 n.3. Staffing ratios at some hospitals have been as low as one doctor to every fifty patients, one psychologist to every five hundred patients, and one nurse to every ten patients. Such minimum level staffing causes a ½-to-¾-hour-a-week personal psychiatric interview to be allocated to each patient. *See* Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282, 1298-99 n.92 (1973). Of 23,000 psychiatrists in the United States, 4,850 or 21 percent are fully employed in mental hospitals. NATIONAL INSTITUTE OF MENTAL HEALTH, FINANCING MENTAL HEALTH CARE IN THE UNITED STATES: A STUDY AND ASSESSMENT OF ISSUES AND ARRANGEMENTS 137 (1973). Full-time professional staff have a lower level of training than part-time staff. Sixty percent of full-time positions are in state institutions. NATIONAL INSTITUTE OF MENTAL HEALTH, MENTAL HEALTH STATISTICS: STAFFING OF MENTAL HEALTH FACILITIES, UNITED STATES 3 (1972). In 1972, of the 133,141 persons on state and county mental hospital staffs, only 3,111 or .024 percent were psychiatrists. *Id.* at 38.

was conceived. Prior to the formulation of the "right to treatment" doctrine, a person could be civilly incarcerated indefinitely in a mental institution without any guarantee that he would receive adequate therapy for his illness.[14] Although the courts in the past only impassively recognized the situation of the mentally ill,[15] early attempts were made to define some of the rights of those confined in mental hospitals.[16] In a celebrated article published in 1960, Dr. Martin Birnbaum was the first to advocate a constitutional right to treatment.[17] His proposition, however, did not receive serious judicial consideration until *Rouse v. Cameron*.[18] In *Rouse*, a habeas corpus petition was filed by a person involuntar-

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[14] *See* AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 49-59 (rev. ed. S. Brackel & R. Rock 1971); Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 502-03 (1960); *cf. In re* Ballay, 482 F.2d 648, 655 (D.C. Cir. 1973). *But cf.* NATIONAL INSTITUTE OF MENTAL HEALTH STATISTICAL NOTE 74: LENGTH OF STAY OF ADMISSIONS TO STATE AND COUNTY MENTAL HOSPITALS, UNITED STATES 1971, at 2 (1973).

[15] The lack of procedural safeguards in civil commitment proceedings was justified by the courts on grounds that treatment and cure would follow commitment. *See* United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1960); Williams v. United States, 250 F.2d 19, 26 (D.C. Cir. 1957); Reisner, *Psychiatric Hospitalization and the Constitution: Some Observations on Emerging Trends*, 1973 U. ILL. L.F. 9, 13; *cf. In re* Gault, 387 U.S. 1, 78 (1966) (Stewart, J., dissenting); Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940).

Courts were reluctant to consider treatment as the purpose of commitment because of the lack of facilities and personnel. Note, *Reflections on the Right to Treatment*, 8 NEW ENG. L. REV. 231, 237 n.35 (1973).

Equally important has been the lack of public knowledge concerning the plight of our mentally ill. *Id.* at 231; *cf.* A. DEUTSCH, THE MENTALLY ILL IN AMERICA 419 (1937); Marshall, *A Critique of the "Right to Treatment" Approach*, in THE MENTALLY ILL AND THE RIGHT TO TREATMENT 38 (G. Morris ed. 1970).

[16] As early as 1940 some courts recognized that those who had been institutionally committed were deprived of due process. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 276-77 (1940):

> We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity . . . and the special importance of maintaining the basic interests of liberty in a class of cases where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.

Accord, Barry v. Hall, 98 F.2d 222, 225 (D.C. Cir. 1938) (incarceration in a mental hospital as in a jail deprives a person of his liberty); *see, e.g.*, Benton v. Reid, 231 F.2d 780 (D.C. Cir. 1956); Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953); Commonwealth v. Page, 339 Mass. 313, 159 N.E.2d 82 (1957); *In re* Maddox, 351 Mich. 358, 88 N.W.2d 470 (1958). *See also* Baur, *Legal Responsibility and Mental Illness*, 57 NW. U.L. REV. 12 (1962); Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274 (1953); Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945 (1959); Weihofen & Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. 307 (1946).

[17] Birnbaum, *supra* note 14. Dr. Birnbaum has been called the "father" of the right to treatment doctrine. Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974).

[18] 373 F.2d 451 (D.C. Cir. 1966). Prior to *Rouse*, however, the rationale of the right to treatment doctrine was recognized in cases holding that the purpose of nonpenal confine-

ily civilly committed[19] to a mental institution after being acquitted of a misdemeanor by reason of insanity.[20] The petitioner alleged that he was not receiving treatment. Although the Court of Appeals for the District of Columbia recognized a statutory right to treatment,[21] dicta by Chief Judge Bazelon alluded to the possibility of a constitutional right to treatment.[22] The court held that since the purpose of confinement is treatment and not punishment,[23] the hospital must demonstrate a bona fide effort to provide treatment which is adequate in the light of the patient's present progress.[24] The institution must also be staffed by an adequate number of personnel[25] who must make periodic inquiries into the needs of the patient.[26] Although reaffirmed in subsequent cases,[27] *Rouse* presented a problem because the court failed to establish guidelines to enforce the right to treatment,[28] a matter which has caused the doctrine to receive

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ment for civilly committed persons dangerous to society is treatment. *E.g.*, Sas v. Maryland, 334 F.2d 506, 513 (4th Cir. 1964), *petition for cert. dismissed*, 407 U.S. 355 (1972); Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring); *cf.* Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957); Commonwealth v. Page, 339 Mass. 313, 159 N.E.2d 82 (1958).

[19] *See* note 3 *supra*.

[20] Rouse was charged with carrying a concealed weapon.

[21] D.C. CODE ANN. § 21-562 (Supp. V., 1966), which provides that a person in a public hospital is entitled to treatment. The incipient statutory allotment for treatment is provided in the *Draft Act*. NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL (Public Health Service Pub. No. 51, 1952), in AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 454-73 (rev. ed. S. Brakel & R. Rock 1971). State statutes protecting a patient's rights essentially are patterned after the *Draft Act*. *See, e.g.*, D.C. CODE ANN. § 21-564(a) (1973); MASS. GEN. LAWS ANN. ch. 123, § 25 (Supp. 1972); N.C. GEN. STAT. § 122-55.2(c) (1974); WASH. REV. CODE ANN. § 71.05.060 (Supp. 1974).

[22] Indeed there may be greater need for the protection of the right to treatment for persons committed without the safeguards of civil commitment procedures. Because we hold that the right to treatment provision applies to appellant, we need not resolve the serious constitutional questions that Congress avoided by prescribing the right.

373 F.2d at 455.

[23] *Id.* at 452; *see* note 18 *supra*; *cf.* notes 3 & 15 *supra*. *See also* Millard v. Cameron, 373 F.2d 468, 472-73 (D.C. Cir. 1966); SPECIAL COMMITTEE OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS AND DUE PROCESS 243 (1962).

[24] 373 F.2d at 456-57.

[25] *Id.* at 458.

[26] *Id.* at 456.

[27] *E.g.*, Covington v. Harris, 419 F.2d 617, 625 (D.C. Cir. 1969) (failure to provide treatment for a person involuntarily committed would raise "serious constitutional questions"); United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1087-88 (2d Cir. 1969) (a person civilly committed because of a verdict of not guilty by reason of insanity should have the same safeguards as a person criminally convicted who becomes mentally ill during incarceration); Tribby v. Cameron, 379 F.2d 104, 105 (D.C. Cir. 1967) (remand to see if treatment was inadequate or exhausted, and if so, release of patient required); Millard v. Cameron, 373 F.2d 468, 472 (D.C. Cir. 1966) (extended *Rouse* to persons indefinitely committed under sexual psychopath laws).

[28] Drake, *Enforcing the Right to Treatment: Wyatt v. Stickney*, 10 AM. CRIM. L. REV. 587, 592 (1971).

criticism[29] and comment.[30] As a result, in the various jurisdictions, the rationale of a "right to treatment" was either addressed on a case-by-case basis dealing with the adequacy of treatment,[31] or the courts refused to recognize the doctrine at all.[32] In *Nason v. Superintendent of Bridgewater State Hospital*,[33] which relied on the *Rouse* decision, the Massachusetts Supreme Judicial Court found a constitutionally grounded right to treatment for nonpenal civilly committed persons. This decision was followed by *Wyatt v. Stickney*,[34] which was the first

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[29] *See* Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967); 80 HARV. L. REV. 898 (1967). *But see* Bazelon, *Implementing the Right to Treatment*, in THE MENTALLY ILL AND THE RIGHT TO TREATMENT 95 (G. Morris ed. 1970).

Several judges feel that the issue of adequacy of treatment cannot be judicially determined. It is interesting to note that in Lake v. Cameron, 364 F.2d 657, 663 (D.C. Cir. 1966) (Burger, J., dissenting), Chief Justice Burger, then a judge on the court of appeals, opposed the majority's decision in a habeas corpus proceeding, insisting that:

> Although proceedings for commitment of the mentally ill persons are not strictly adversary, a United States court in our legal system is not set up to initiate inquiries and direct studies of social welfare facilities or other social problems.

On another occasion, in Dobson v. Cameron, 383 F.2d 519, 523 (D.C. Cir. 1967) (Burger, J., concurring), Chief Justice Burger stated, "I have grave doubts that we are qualified to oversee mental hospitals in cases of civil commitments . . . ." Judge Danaher generally expressed the same view in his concurring opinion. *Id.* at 521-22.

Frustrating the courts' attempts at determining adequacy of treatment is the psychiatric profession itself, which feels that only the doctors can decide when a patient should be treated. *See* American Psychiatric Ass'n, *Position on the Adequacy of Treatment*, 123 AM. J. PSYCHIAT. 1458 (1967). *But see* Bazelon, *supra* at 97 (yet in other areas demanding judicial adroitness the courts have been successful in prescribing standards). *See also* Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971) (minimum physical conditions which must be provided in state prisons); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972) (minimum conditions prescribed for a prison).

[30] *See, e.g.*, Drake, *supra* note 28; Reisner, *supra* note 15, at 15. *See generally* Schwitzgebel, *Right to Treatment of the Mentally Disabled: The Need for Realistic Standards and Objective Criteria*, 8 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 513 (1973); Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972).

[31] *See, e.g.*, Dobson v. Cameron, 383 F.2d 519 (D.C. Cir. 1967); Martarella v. Kelly, 359 F. Supp. 478 (S.D.N.Y. 1973); Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio), *supplemented*, 330 F. Supp. 707 (N.D. Ohio 1971).

[32] *See* New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

In a number of cases involving the issue of the right to treatment the Supreme Court has denied certiorari. *E.g.*, Donaldson v. O'Connor, 400 U.S. 869 (1970); Donaldson v. O'Connor, 390 U.S. 971 (1968); People *ex rel.* Anonymous v. LaBurt, 385 U.S. 936 (1966).

[33] 353 Mass. 604, 233 N.E.2d 908 (1968). Petitioner for habeas corpus was indicted for murder and subsequently transferred to a mental institution without standing trial. The court held that a patient could be released if he was not found guilty of a crime, because his detention would deprive him of his liberty without due process of law.

[34] 325 F. Supp. 781 (M.D. Ala. 1971), *on submission of proposed standards by defendants*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d

case to employ section 1983[35] rather than a habeas corpus petition, to uphold a right to treatment for all patients in a mental institution.[36] Although the constitutional grounds for the decision were not fully discussed, the court in *Wyatt* held that since the purpose of involuntary commitment is not mere custodial care or punishment but treatment as would give each patient a realistic opportunity to improve,[37] it follows that the only constitutional justification for civil commitment is treatment;[38] otherwise the hospital becomes akin to a prison,[39]

1305 (5th Cir. 1974). A class action was brought by inmates involuntarily civilly committed through noncriminal procedures, but without the constitutional protections afforded to defendants criminally prosecuted. The inmates requested that a preliminary injunction be imposed on the Alabama hospital forbidding further admittance pending a determination of the adequacy of treatment. From the evidence the court found the treatment to be inadequate and gave the state health board 6 months to treat the patients.

[35] *See* Note, *Civil Rights: The Federal Courts and the "Right to Treatment" Under 42 U.S.C. § 1983 (1970)*, 27 OKLA. L. REV. 238 (1974). Under section 1983 a right to relief exists in the federal courts for a violation of a constitutional right under color of state or local law. *See* note 6 *supra*. *See generally* Note, *The Civil Rights Act of 1871: Continuing Vitality*, 40 NOTRE DAME LAW. 70 (1964). Because civil commitment deprives liberty in the constitutional sense, the due process clause and section 1983 have been employed to control government actions in this area. *Cf.* Humphrey v. Cady, 405 U.S. 504, 509 (1972). *But cf.* Prochaska v. Brinegar, 251 Iowa 834, 102 N.W.2d 870 (1960); Chavannes v. Priestly, 80 Iowa 316, 45 N.W. 766 (1850); McMahon v. Mead, 30 S.D. 515, 139 N.W. 122 (1912). *See generally* Comment, *Liberty and Required Mental Health Treatment*, 114 U. PA. L. REV. 1067 (1966).

[36] Class actions based on section 1983 are procedurally more desirable than individual habeas corpus petitions in raising the right to treatment issue because in habeas corpus proceedings, relief is granted only to one individual. *See* Drake, *supra* note 28, at 595; Note, *A New Emancipation: Toward an End to Involuntary Civil Commitments*, 48 NOTRE DAME LAW. 1334, 1342-43 (1973); Note, *Civil Rights: The Federal Courts and the "Right to Treatment" Under 42 U.S.C. § 1983 (1970)*, *supra* note 35; *cf.* Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (although section 1983 does not specify judicial relief under its terms, this does not limit its relief); MENTAL HEALTH LAW PROJECT, BASIC RIGHTS OF THE MENTALLY ILL 20 (1973). *But see* Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973) (petition of habeas corpus can be treated as a class action in a challenge to conditions of confinement, or wherever a group can benefit from it); *cf.* Carafas v. LaValle, 391 U.S. 234 (1968), *overruling* Parker v. Ellis, 362 U.S. 574 (1960) (prisoner's final unconditional release from prison did not moot his habeas corpus attack, with which serious collateral issues may be entertained). *See generally* Birnbaum, *A Rationale for the Right*, 57 GEO. L.J. 752 (1969).

There are numerous cases in which section 1983 has been used to assert the right to receive treatment. *See, e.g.*, Knecht v. Gillman, *supra*; Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973); Burchett v. Power, 355 F. Supp. 1278 (D. Ariz. 1973); Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972). *But cf.* New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

[37] 325 F. Supp. at 784; *see* SPECIAL COMMITTEE OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, *supra* note 23, at 243; *cf.* Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964), *petition for cert. dismissed*, 407 U.S. 355 (1972); Ragsdale v. Overholser, 281 F.2d 943, 949 (D.C. Cir. 1960) (Fahy, J., concurring).

[38] 325 F. Supp. at 785.

[39] *Id.*; *see* Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring).

and the patient is denied due process of law.[40] *Wyatt* also recognized as an element of the right to treatment the "least restrictive alternative doctrine," which would require that patients not be institutionalized unless absolutely necessary.[41] In the wake of *Wyatt*, the "right to treatment" doctrine has been generally mandated by the courts[42] and extended to juveniles involuntarily civilly committed to correctional schools.[43] Some courts have even suggested that foundations for the right may exist in the eighth amendment's protection against cruel and unusual punishment.[44]

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[40] It would seem that when a person is involuntarily committed through noncriminal proceedings lacking the same procedural safeguards accorded to defendants in criminal prosecutions, he has a constitutional right to treatment lest the hospital become a prison. *See* Drake, *supra* note 28, at 596-97 n.30; *cf.* United States *ex. rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969); United States v. Jackson, 306 F. Supp. 4 (N.D. Cal. 1969). *Compare* Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 612, 233 N.E.2d 908, 913 (1968), *with* Silver v. People, 22 Mich. App. 1, 4, 176 N.W.2d 702, 703 (1970).

[41] 344 F. Supp. at 379-85. *But see* State v. Sanchez, 80 N.M. 438, 457 P.2d 370 (1969), *appeal dismissed*, 396 U.S. 276 (1970) (state need not consider least restrictive alternative). A later statute, N.M. STAT. ANN. § 43-2-13 (Supp. 1973), recognized the least restrictive alternative doctrine. The doctrine is based on the premise that rather than deprive a mentally deficient person of his liberty by institutionalization, he should be placed in a less restrictive setting such as a short-term institution. Some examples are clinics, halfway houses, day hospitals, and nursing homes. *See* Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Dixon v. Attorney Gen., 325 F. Supp. 966 (M.D. Pa. 1971); Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973); *In re* Anonymous, 69 Misc. 2d 181, 329 N.Y.S.2d 542 (Sup. Ct. 1972). *See generally* MENTAL HEALTH LAW PROJECT, *supra* note 36, at 27; Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972).

[42] *E.g., In re* Curry, 452 F.2d 1360 (D.C. Cir. 1971), *motion for summary reversal and suggestion of mootness denied*, 470 F.2d 368 (D.C. Cir. 1972); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973); Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973); Burchett v. Power, 355 F. Supp. 1278 (D. Ariz. 1973); United States v. Pardue, 354 F. Supp. 1377 (D. Conn. 1973); Maatallah v. Warden, Nevada State Prison, 470 P.2d 122 (Nev. 1970); Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973); *see In re* Jones, 338 F. Supp. 428 (D.D.C. 1972) (statutory right to treatment but no constitutional right). *Contra*, New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (procedural due process not a foundation on which to base a constitutional right to treatment); Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972) (no constitutional right to treatment). For a general discussion that there is no constitutional right to treatment, see Dershowitz, *On Preventative Detention*, 12 N.Y. REV. OF BOOKS 22 (1969); 2 FORDHAM URBAN L.J. 363 (1974).

[43] Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974); Morales v. Turnman, 364 F. Supp. 166 (E.D. Tex. 1973); Inmates v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972). *But see* New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973). *See generally* Pyfer, *Deprivation of Liberty and the Right to Treatment*, 7 CLEARINGHOUSE REV. 419 (1974); Renn, *The Right to Treatment and the Juvenile*, 19 CRIME & DELIN. 477 (1973).

[44] *Cf.* Robinson v. California, 370 U.S. 660 (1962); Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973); Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972); Rozecki v. Gaughan, 459

With this background, the federal courts have developed two distinct rationales upon which to rest a constitutional right to treatment.[45] One is a quid pro quo rationale, developing from the premise that since civil commitment proceedings lack the same procedural safeguards accorded in criminal proceedings, the absence of such guarantees is constitutionally justified only when the purpose of commitment is treatment that will either cure or improve the mental health of the patient.[46] The second major rationale flows from the Supreme Court's ruling in *Jackson v. Indiana*[47] which held that the nature of commitment must bear a reasonable relation to the purpose of the commitment. It follows that when a person is committed by the state acting in its role as *parens patriae* the purpose of his being committed is based upon his need for treatment and not because of his danger to society.[48] When the purpose of commitment is treatment and treatment is denied, due process is violated because the nature of the commitment bears no relation to its purpose.[49] One federal court of ap-

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F.2d 6 (1st Cir. 1972); Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973). Through the fourteenth amendment, the eighth amendment's guarantee against cruel and unusual punishment has been applied to the states. Although confinement is not per se cruel nor unusual punishment, conditions may be so deplorable that "reasonably civilized people" may be shocked even though no individual or group is subjected to a specific act of cruelty. *See* Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); *cf.* Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971). *See generally* Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972) (failure to provide adequate conditions at prison constituted cruel and unusual punishment); Lipman, *Mississippi's Prison Experience*, 45 MISS. L.J. 685 (1974).

[45] *See* Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974). In a class action under 42 U.S.C. § 1983 (1970) for injunctive relief regarding inadequate treatment in a Minnesota state mental hospital, the court held where persons are civilly committed for reasons of retardation due process requires minimally adequate treatment designed to allow each committed person the opportunity to be cured or improve his mental health. 373 F. Supp. at 499.

[46] Welsch v. Likens, 373 F. Supp. 487, 496 (D. Minn. 1974); *see* Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 761 (E.D.N.Y. 1973); Inmates v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972); Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971); note 40 *supra*; *cf.* McKeiver v. Pennsylvania, 403 U.S. 528, 552 (1971) (White, J., concurring); Knecht v. Gillman, 488 F.2d 1136, 1138 (8th Cir. 1973). The quid pro quo doctrine has been characterized as an equal protection rationale. *See* MENTAL HEALTH LAW PROJECT, *supra* note 36, at 15-16. *But see* Note, *Developments in the Law, supra* note 3, at 1325 n.39.

[47] 406 U.S. 715 (1972) (state must justify commitment by therapeutic progress or release patient); *accord*, McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972).

[48] *See* note 3 *supra*. As indicated above, civil commitment is based upon either dangerousness, or nondangerousness. But these distinctions have been confused. *See* Higgins v. United States, 344 U.S. 870 (1953) (does not differentiate police power from *parens patriae); cf.* Note, *supra* note 29. *See generally* Marshall, *supra* note 15.

[49] *See* Welsch v. Likens, 373 F. Supp. 487, 496 (D. Minn. 1974) (because the patient is not guilty of a crime against society, the only purpose of his commitment which is constitutionally justified is treatment, regardless of statutory procedural protections); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974); *cf.* Robinson v. California, 370 U.S. 660 (1962); United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1088 (2d Cir. 1969); Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971).

peals has held that without some form of treatment the state has no justification for acting as *parens patriae* in civil commitments.[50] In response to defenses raised by hospital and state mental health officials claiming lack of money and personnel, federal courts have held that a person cannot be deprived of his constitutional rights because of inadequate state resources.[51]

When it has been found that a patient or a group of patients has been denied treatment, some courts have granted long-term injunctive relief and have required that future planning be designed to comport with minimal constitutional standards.[52] Other courts have granted a specific decree and have required the elimination of improper conditions and the establishment of minimum facility requirements, especially in the area of personnel and other institutional conditions.[53] To guarantee compliance with their orders, courts have appointed an ombudsman[54] or a committee[55] to oversee the matter. For the patient who has actually been denied treatment, relief is available in the form of habeas corpus[56] or damages.[57]

Some courts have not been persuaded to accept a constitutional right to treatment. In *Burnham v. Department of Public Health*,[58] a federal district court held that a federal statute must exist which guarantees treatment standards before a patient's right to treatment can be recognized. *Burnham* was

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[50] *In re* Ballay, 482 F.2d 648, 659 (D.C. Cir. 1973).

[51] *See* Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972); Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971); *cf.* Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971). *See also* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), where in affirming *Wyatt v. Stickney* and upholding the instant case, the court of appeals recognized that "the right to treatment can be implemented through judicially manageable standards." *Id.* at 1314. The Fifth Circuit, however, declined "unnecessarily and prematurely" addressing the issue of whether or not a district court can order sale of state lands or order that the state budget be altered to finance requisite standards. The court did note, however, that jurisdiction for such an action would be in a three-judge court. *Id.* at 1318.

[52] *E.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

[53] *See* Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972).

[54] *See* Morales v. Turnman, 364 F. Supp. 166 (E.D. Tex. 1973). *See also* Broderick, *One-Legged Ombudsman in a Mental Hospital: An Over-the-Shoulder Glance at an Experimental Project*, 22 CATH. U. AM. L. REV. 517 (1973).

[55] *See* Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).

[56] By statute several states provide habeas corpus relief if treatment is refused. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2001 (1956); COLO. REV. STAT. ANN. § 65-1-2 (1963); DEL. CODE ANN. tit. 10, § 6902 (1953); FLA. STAT. ANN. § 79.01 (Supp. 1974); HAWAII REV. STAT. § 660-1 (1968); MICH. COMP. LAWS ANN. § 600.4307 (1968); MONT. REV. CODES ANN. § 95-2701 (1969); N.C. GEN. STAT. § 17-3 (1965); WASH. REV. CODE ANN. §§ 7.36.010-.020 (Supp. 1974); W. VA. CODE ANN. § 53-4-1 (1966).

[57] *Cf.* Wheeler v. Glass, 473 F.2d 983 (7th Cir. 1973).

[58] 349 F. Supp. 1335 (N.D. Ga. 1972). In a class action brought by inmates of the state mental hospital alleging deprivation of the right to treatment, the court held that due to a lack of judicially enforceable standards, the matter should be left to the state. The court noted in dicta, however, that there was an adequate remedy at law available on an individual basis, based on the state's mental hygiene law. *Id.* at 1343.

followed by *New York State Association for Retarded Children v. Rockefeller*[59] which rejected any constitutional mandate for treatment. The major obstacle to the acknowledgment of a constitutional right to treatment is the lack of standards to formulate and enforce the right.[60] Stemming from this is a definitional problem within the courts as to the *kind* of treatment which should be extended to the patient.[61] This confusion results from conflicting theories of psychiatry and a wide range of possible treatment methods.[62] Aggravating this situation is the "tentativeness" and "uncertainty" of opinions given by the psychiatric profession regarding mental illness,[63] a fact realized by the courts.[64]

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[59] 357 F. Supp. 752 (E.D.N.Y. 1973) (although there is no constitutional right to treatment, patients had sufficient state claims).

[60] *See* Burnham v. Department of Pub. Health, 349 F. Supp. 1335, 1341-44 (N.D. Ga. 1972).

[61] *See, e.g.*, Powell v. Texas, 392 U.S. 514, 529 (1968) (effective treatment); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (habilitation); Millard v. Cameron, 373 F.2d 468, 472 (D.C. Cir. 1966) (suitable treatment); Rouse v. Cameron, 373 F.2d 451, 456 (D.C. Cir. 1966) ("bona fide effort" to cure or improve); Wyatt v. Stickney, 344 F. Supp. 373, 374 (M.D. Ala. 1972) (adequate treatment providing realistic opportunity to cure or improve); *In re* Jones, 338 F. Supp. 428 (D.D.C. 1972) (proper treatment); Clatterbuck v. Harris, 295 F. Supp. 84, 86 (D.D.C. 1968) (effective treatment); Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968) (adequate treatment); *In re* Maddox, 351 Mich. 358, 362, 88 N.W.2d 470, 472 (1967) (curative treatment); Application of D.D., 118 N.J. Super. 1, 5, 285 A.2d 283, 287 (App. Div. 1971) (suitable treatment); People v. Kearse, 28 App. Div. 2d 910, 282 N.Y.S.2d 136, 137 (1967) (appropriate treatment).

[62] *See* Szasz, *The Right to Health*, 57 GEO. L.J. 734, 740-43 (1969); 10 WAKE FOREST L. REV. 289, 293 (1974); *cf.* Reisner, *supra* note 15. *See generally* B. ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRISTS AND THE LAW (1972); S. GLUECK, LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE? (1966); T. SZASZ, PSYCHIATRIC JUSTICE (1965); Cameron, *Non-Medical Judgement of Medical Matters*, 57 GEO. L.J. 716 (1969); Katz, *The Right to Treatment—An Enchanting Legal Fiction?* in THE MENTALLY ILL AND THE RIGHT TO TREATMENT 3 (G. Morris ed. 1971); Koestler, *Can Psychiatrists be Trusted?*, 34 ENCOUNTER NO. 3 at 50 (1970); Note, *Guaranteeing Treatment for the Committed Mental Patient: The Troubled Enforcement of an Elusive Right*, 32 MD. L. REV. 42 (1972). *See also* D. ROSENHAN & P. LONDON, THERAPY AND REMEDIATION IN FOUNDATIONS OF ABNORMAL PSYCHOLOGY 557 (1968); Pasamanick, Dinitz & Lefton, *Psychiatric Orientation and Its Relation to Diagnosis and Treatment in a Mental Hospital*, 116 AM. J. PSYCHIAT. 127 (1959); Waldman, *A Theory and Practice of Humanistic Psychotherapy*, 25 J. INDIVIDUAL PSYCHOL. 19 (1969); Note, *supra* note 30. "Psychiatric treatment" has no specific inherent meaning. Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment*, 57 NW. U.L. REV. 19, 22 (1962).

[63] *See, e.g.*, Katz, Cole & Lowery, *Studies of the Diagnostic Process*, 125 AM. J. PSYCHIAT. 937 (1969); Koestler, *supra* note 62, at 51-52. *See generally* B. ENNIS, *supra* note 62, at 216; Note, *A New Emancipation: Toward an End to Involuntary Civil Commitments, supra* note 36, at 1337; Torrey, *The Psychiatrist Has No Clothes*, Washington Post, Oct. 13, 1974, § C, at 1, col. 1.

[64] Greenwood v. United States, 350 U.S. 366, 375 (1956); Leland v. Oregon, 343 U.S. 790, 802 (1952) (Frankfurter, J., dissenting); United States v. Klein, 325 F.2d 283, 286 (2d Cir. 1963); Blocker v. United States, 288 F.2d 853, 859 (D.C. Cir. 1961) (Burger, J., concurring).

Experiencing increasing denunciations,[65] the psychiatric profession faces mounting discord from the legal profession.[66] To attenuate these difficulties, it has been suggested that a legislative framework be provided to guide courts in fashioning treatment standards.[67] A more drastic proposal calls for the abrogation of involuntary civil commitments;[68] the following encourage the serious consideration of this resolution to the problem: The overuse of involuntary civil commitments,[69] the lower economic status of the majority of the residents in our public mental institutions,[70] the skepticism that the problem will not change in the future,[71] and little agreement among psychiatrists as to the presence of

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[65] *See* authorities cited note 62 *supra*. A particular criticism of the American psychiatrist is his "cavalier" attitude toward the patient. Koestler, *supra* note 62; *cf.* Stowers v. Wolodzko, 386 Mich. 119, 135, 191 N.W.2d 355, 363 (1971); Torrey, *supra* note 63.

[66] Chief Justice Burger has commented, "The whole problem of psychiatric testimony is not fitted to the adversary system." *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess., App. at 562 (1969-1970) [hereinafter cited as *1969-1970 Hearings*]; *see* Ibanez, *Bridging the Gap on Concepts of Mental Illness*, 1 AM. CRIM. L.Q. 23, 24, 30 (1962). *See generally* Blocker v. United States, 288 F.2d 853, 857, 860 (Burger, J., concurring) (noting the "fallacy of judicial reliance" on psychiatric terminology); S. GLUECK, *supra* note 62; T. SZASZ, PSYCHIATRIC JUSTICE, *supra* note 62. *See also* note 29 *supra*.

[67] *See, e.g.*, Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972); S. GLUECK, *supra* note 62, at 112; *cf.* Bassiouni, *The Right of the Mentally Ill to Cure and Treatment: Medical Due Process*, 15 DEPAUL L. REV. 291, 300 (1966). A leading proponent for a constitutional right to treatment, Chief Judge David Bazelon, has himself acknowledged that "the courts cannot implement the right without the aid of a legislative framework." Bazelon, *supra* note 29, at 99.

[68] Note, *A New Emancipation: Toward an End to Involuntary Civil Commitments, supra* note 36, at 1351-54; *cf.* Jackson v. Indiana, 406 U.S. 715, 737 (1972). *See generally* B. ENNIS, *supra* note 62; *1969-1970 Hearings, supra* note 66, App. at 473, 562; Ennis, *Civil Liberties and Mental Illness*, 7 AM. CRIM. L. BULL. 101 (1971). Because involuntary civil commitment laws do not justify commitment of the physically ill, they should not justify commitment of the mentally ill. *1969-1970 Hearings, supra* note 66 at 273, 641.

[69] *See* T. SZASZ, PSYCHIATRIC JUSTICE, *supra* note 62, at 73-82; AMERICAN BAR FOUNDATION, *supra* note 21, at 63. Civil commitment has been used as a method of getting rid of undesirables. Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and a Proposal*, 45 MISS. L.J. 43, 48-49 (1974); *cf.* Birnbaum, *supra* note 36, at 772 n.57.

[70] The majority of patients in public mental institutions are in the low income bracket. AMERICAN BAR FOUNDATION, *supra* note 21, at 38; *1969-1970 Hearings, supra* note 66, at 174, 269, 298; *cf.* Shaffer, *A Lawyer's Plea: Open Mental Hospital Doors*, The National Observer, Dec. 9, 1972, at 26. Elderly persons also constitute a large percentage of the resident population. B. ENNIS, *supra* note 62, at 222; Shaffer, *supra*.

[71] B. ENNIS, *supra* note 62, at 215-16; Katz, *supra* note 62, at 34-36. Treatment methods become quickly outdated. *See 1969-1970 Hearings, supra* note 66, at 30. Increased funding has shown little promise. *Id.* at 412; *cf.* 80 HARV. L. REV. 898, at 901 n.18 (1967). Prolonged hospitalization is antitherapeutic. B. ENNIS, *supra* note 62, at 215; Rosenhan, *On Being Sane and Insane in Insane Places*, 13 SANTA CLARA LAW. 379, 394-98 (1973). *See generally* R. BARTON, INSTITUTIONAL NEUROSIS (2d ed. 1966); B. PASAMANICK, F. SCRAPETTI & S. DINITZ, SCHIZOPHRENICS IN THE COMMUNITY (1967). The hospital environment induces patients to remain. S. GLUECK, *supra* note 62, at 9.

mental illness.[72] The recent trend of legislation suggests a movement toward limiting civil commitments to the dangerously mentally ill.[73] Current antagonists of involuntary civil commitment to state institutions stress commitment's dispensability and emphasize the need for federally funded community health centers.[74]

In the instant case, the court held that since the purpose of involuntary civil commitment under the *parens patriae* doctrine is based on the need for treatment, and since the nature and duration of the treatment must bear a reasonable relation to the purpose of the commitment, the fourteenth amendment's due process clause requires that constitutionally adequate treatment be provided for the nondangerous patient. Further, the court confirmed that due process limits the government's power to detain an individual. These limitations include a requirement that confinement be in retribution for a specific offense, and that its duration be limited to a fixed term after certain procedural safeguards have been observed. Absent these limitations, a person confined by the state in a mental institution must be extended a quid pro quo in the form of minimally adequate treatment so as to accord a cure or improvement. As to

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[72] *See* B. ENNIS, *supra* note 62, at 216; *1969-1970 Hearings, supra* note 66, at 69; NEWSWEEK, Jan. 29, 1973, at 46, col. 2; Note, *A New Emancipation: Toward an End to Involuntary Civil Commitments*, *supra* note 36, at 1338; *cf.* S. GLUECK, *supra* note 62, at 16. Several cases illustrate this proposition, one being Egan v. United States, 158 F. Supp. 377 (Ct. Cl. 1958). Egan, a Marine during World War II, was admitted to a hospital for bronchitis. Perjured testimony from other patients regarding Egan's role in a fight led doctors to believe that Egan was mentally ill. He was subsequently diagnosed as paranoid and schizophrenic, and was committed to a mental hospital. During confinement his efforts to prove his sanity were futile. It was only after he escaped from the hospital and returned with reports from other doctors attesting to his sanity that he was released and dismissed as permanently unfit for the service. Upon appeal to the Board for Corrections of Naval Records it was found that the mental hospital erroneously had sent another man's record of insanity who bore the same name as Egan. The Board found Egan to be mentally competent and held his diagnosis of insanity to be in error and based on false premises. *See also* Dershowitz, *The Psychiatrists' Power in Civil Commitment: A Knife That Cuts Both Ways*, 2 PSYCHOL. TODAY, Feb. 1969, at 43.

[73] Note, *Developments in the Law, supra* note 3, at 1205; *cf.* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974); Dixon v. Attorney Gen., 325 F. Supp. 966, 974 (M.D. Pa. 1971); *In re* Levias, 83 Wash. 2d 253, 517 P.2d 588, 591 (1973). *But cf.* Fhagen v. Miller, 29 N.Y.2d 348, 378 N.E.2d 615, 328 N.Y.S.2d 393, *cert. denied*, 409 U.S. 845 (1972); Maycock v. Martin, 157 Conn. 56, 245 A.2d 574 (1968), *cert. denied*, 393 U.S. 1111 (1969).

[74] *See, e.g.*, BASS, METHOD FOR MEASURING CONTINUITY OF CARE IN COMMUNITY HEALTH CENTER, HEW PUB. 72-9109 (1972); NATIONAL INSTITUTE OF MENTAL HEALTH INNOVATIONS, MENTAL HEALTH SERVICES PROGRESS REPORT NO. 2, HEW PUB. 72-0938 (1971). *See also* B. ENNIS, *supra* note 62, at 222-23; *Hearings on Oversight over the Administration of the Community Health Centers Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. (1973); *1969-1970 Hearings, supra* note 66, at 44; N.Y. Times, Feb. 1, 1974, at 33, col. 6; Trotter & Kuttner, *The Mentally Ill: From Back Wards to Back Alleys*, Washington Post, Feb. 17, 1974, § C, at 1, col. 7. This approach is desirable. *See* note 41 *supra*. In addition, increased funding would be available for treatment. *Cf. 1969-1970 Hearings, supra* note 66, at 641.

appellants' contention that a right to treatment could not be governed by judicially ascertainable or manageable standards, the court held that in the instant case a denial of the right to treatment could be determined without formulating a comprehensive, specific definition of "adequate" treatment. The court stated that in other cases expert testimony can be given to determine what constitutes "adequate" in relation to a particular patient. In addition, the court recognized that based on *Wyatt*, institution-wide standards of adequacy may be fashioned by the courts with the use of expert testimony.

Because of the alarming disarray of conditions in our public mental institutions, there can be little doubt that constitutional questions do exist. As the Supreme Court has remarked, civil commitment involves a critical loss of liberty in the constitutional sense.[75] To mitigate the deprivation of one's right to liberty, some courts have created a constitutional right to treatment. But the crux of any such right is the precise definition of "treatment." Without this definition, courts are precluded from formulating standards to enforce and implement the newly created right. Realizing this dilemma, at least one federal court has noted that the lack of standards makes the right to treatment issue nonjusticiable.[76] Chief Judge Bazelon has correctly observed that the courts have successfully formulated standards in other highly technical areas;[77] but this is possible only if standards can be applied accurately in any given set of circumstances. It is questionable that courts can delve into the complexities of mental illness and emerge with any semblance of accuracy in defining standards of treatment. Defining standards involves identifying a particular patient's needs, finding of a breach of duty in meeting those needs, and prescribing treatment methods geared to improve the patient's mental health.[78] This task is formidable enough for psychiatrists alone. Analogizing *Wyatt*, courts do not face this problem with determining minimum standards for other institutional conditions. Although adept at requiring certain environmental conditions in state institutions,[79] courts have little assurance that once these conditions are met the patient will receive the necessary therapy. The Supreme Court defined due process requirements for mental institutions in *Jackson v. Indiana*; but is it possible for states to comply with a requirement that all patients committed for *treatment* be *treated*, especially if the patient's condition is hopeless? There are remedies, however, for the involuntarily civilly committed individual who is harmless but faces potentially indefinite imprisonment even though he has committed no specific act for which to be punished. Habeas corpus[80] and section 1983[81] provide an available means of relief without burdening courts with the

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[75] Humphrey v. Cady, 405 U.S. 504, 509 (1972).

[76] Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

[77] Bazelon, *supra* note 29, at 97.

[78] It is more likely that the judicial proceeding itself will have a deleterious effect on the patient's health. Birnbaum, *supra* note 36, at 756, 762.

[79] *See* Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).

[80] *See* note 56 *supra*.

[81] *See* notes 6 & 36 *supra*.

impossible task of determining whether or not a patient has received *adequate treatment*.[82]

No constitutional mandate exists requiring a state to provide for its mentally ill.[83] A traditional function of the state, however, has been to furnish facilities to care for and to detain its mentally deficient citizenry, a function largely motivated by political as well as humane reasons.[84] Civil commitment is based upon a subjective determination by the legislature as a means to deal with the mentally ill, which in turn is entirely dependent upon the imprecise "science" of psychiatry. This presents an arduous barrier for any court attempting to establish objective criteria in the area of mental illness. The matter, therefore, should be left in the hands of the state with the hope that through enlightened legislation our public mental institutions may be improved.[85] The most desirable solution, but one least likely to occur, is the dissolution of civil commitments. Then only the seriously ill would be dealt with and perhaps in a more effective manner.[86] With the advent of community health centers, at least some hope exists that a person may be treated for a mental disorder without suffering a complete loss of liberty.[87]

The instant case is significant because it offers the Supreme Court its first opportunity to take issue with the right to treatment. If the Court rejects the existence of such a right, its rationale will probably rest upon the lack of standards.[88] Of course, the instant case did not develop standards for treatment; rather the requirements of due process were scrutinized by the court and found to have been intentionally denied. Recognition of a constitutional right to treatment by the Court will open the floodgates of litigation.[89] The Court's accep-

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[82] *See* note 61 and accompanying text *supra*. There is also the alternative of suing for damages in a civil action for failure to treat a mentally ill patient. *See* Whitree v. New York, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968).

[83] *See* Welsch v. Likens, 373 F. Supp. 487, 499 (D. Minn. 1974); *cf.* Dandridge v. Williams, 397 U.S. 471 (1970); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 761 (E.D.N.Y. 1973).

[84] State mental institutions provide a depository for societal derelicts. *See* notes 70 & 71 *supra*; note 86 *infra*.

[85] It was through the illuminating hearings of the Ervin Committee that the District of Columbia was able to draft an act protecting rights of civilly committed persons. *See* D.C. CODE ANN. § 21-564(a) (1973); *1969-1970 Hearings, supra* note 66.

[86] Obviously, there would be a problem with the mass release of people who are largely unable to care for themselves.

[87] *See* notes 41 & 74 *supra*. Alternatives have been ordered in other areas. *See, e.g.*, Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 642-51 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

[88] The Burger Court has been reluctant to create or broaden expansive constitutional rights. *E.g.*, Milliken v. Bradley, 94 S. Ct. 3112 (1974), *noted in* 46 MISS. L.J. 181 (1975); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973). *But see* Reed v. Reed, 404 U.S. 71 (1971).

[89] There have been a number of cases filed in Mississippi courts since the instant decision was rendered. *E.g.*, Bailey v. Waller, Civil No. GC-74-129-S (N.D. Miss., filed Nov. 26, 1974) (alleging a constitutional right to treatment); Brown v. Jaquith, No. 48,420 (Miss. Sup. Ct., filed Oct. 21, 1974) (right to be released from prolonged confinement);

tance of this position will produce serious collateral issues. Questions of who can administer treatment and to what extent a patient may be treated must be answered. A related issue is the right of a patient to refuse treatment, particularly when some form of treatment may have been offered. Finally, courts will have to face the crucial problem of defining what "treatment" is. The right to treatment will not provide a solution to the dilemmas in our mental institutions; it will merely extend the difficulty into an area more nebulous than mental illness itself.

Edward J. Currie, Jr.

McCraw v. Jaquith, No. 92,361 (Hinds County, Miss. Ch., filed June 6, 1974) (alleging a constitutional right to treatment). Decisions have been handed down implementing the *Jackson v. Indiana* rationale. *E.g.*, House v. Jaquith, No. 9,307 (Lee County, Miss. Cir. Ct., Oct. 24, 1974); Wadlington v. Jaquith, No. 2,820 (Panola County, Miss. Cir. Ct., Oct. 16, 1974); Boykins v. Jaquith, Habeas Corpus No. 2 (Sharkey County, Miss. Cir. Ct., Sept. 24, 1974); State v. Alexander, No. 5,780 (Simpson County, Miss. Cir. Ct., Sept. 9, 1974).

Federal Courts—Standing in Taxpayer Suits—A Taxpayer Must Have More Than a Commonly Shared Injury to His Ability to Vote Intelligently Before He Can Be Deemed to Meet the Article Three Requirements for Standing

The respondent, relying solely on his status as a federal taxpayer, sought an injunction against the United States Government[1] alleging that certain provisions of the Central Intelligence Agency Act, 50 U.S.C. §§ 403 *et seq.* (1970), violated the United States Constitution.[2] The respondent contended that since the Act permitted the Central Intelligence Agency [CIA] to account for its expenditures "solely on the certificate of the Director"[3] it violated article I, section 9, of the Constitution which requires that: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[4] The federal district court granted the government's motion to dismiss on the ground that the respondent lacked standing to sue and because the case raised political questions not suited for judicial determination. The Court of Appeals for the Third Circuit reversed, holding that the respondent had standing.[5] The Supreme Court, *held*, for the defendant. Where a taxpayer challenges congressional power to authorize allegedly unconstitutional fiscal accounting procedures by a federal agency because the accounting procedures hinder his ability to vote intelligently, the taxpayer has not alleged sufficient personal injury to meet article III requirements for standing. *United States v. Richardson*, 418 U.S. 166 (1974).

Standing, as a prerequisite to federal court jurisdiction in suits by citizens challenging government action,[6] is a relatively new doctrine,[7] unheard of at the time the Constitution was drafted,[8] which developed independently of English law.[9] It has not served as a bar to state and local government challenges by citizens.[10] Prior to 1923, the Court had never held "standing" to be a prerequisite

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[1] Despite repeated requests by the respondent for detailed records of the expenditures of the Central Intelligence Agency, the government refused to supply him with anything other than a general document on the total expenditures of the entire government entitled "Combined Statement of Receipts, Expenditures, and Balances of the United States Government." The respondent sought an injunction to prevent the government from printing the document and representing it as fulfilling the mandates of art. I, § 9, of the Constitution. United States v. Richardson, 418 U.S. 166 (1974).

[2] According to the Court, this was the "essence" of respondent's suit. 418 U.S. at 169.

[3] Central Intelligence Agency Act, ch. 227, § 10(b), 50 U.S.C. § 403j(b) (1970).

[4] The respondent further contended that because of this constitutional violation he was unable to vote intelligently. 418 U.S. at 176.

[5] Richardson v. United States, 465 F.2d 844 (3d Cir. 1972), *rev'd*, 418 U.S. 166 (1974).

[6] There are basically two types of citizen suits: a citizen mandamus, where the citizen seeks to compel the government to take some action, and a taxpayer suit, where a citizen seeks to forbid a government action or appropriation. *See* Comment, *Taxpayer's Suits: A Survey and Summary*, 69 Yale L.J. 895 (1960). *See generally* L. Jaffe, Judicial Control of Administrative Action 470 (1965).

[7] Comment, *Standing to Sue for Members of Congress*, 83 Yale L.J. 1665, 1668 (1974).

[8] Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 Yale L.J. 816, 818 (1969).

[9] L. Jaffe, *supra* note 6, at 466-67.

[10] 3 K. Davis, Administrative Law Treatise § 22.09, at 245 (1958).

to federal jurisdiction.[11] In 1923, however, in *Frothingham v. Mellon*,[12] the Court held that a taxpayer bringing suit against an official had not suffered and was not in danger of suffering a direct injury as a result of the expenditures of which he complained and thus had no right to challenge the allegedly unconstitutional federal appropriations. His injury was shared in common with the general public.[13] The Court distinguished federal taxpayer suits from those suits in which a taxpayer is allowed to challenge local and state expenditures on the basis of the "comparatively minute" tax paid at the federal level by the individual taxpayer.[14] The Court's holding in *Frothingham* declared a rule of judicial self-restraint rather than a jurisdictional limitation based on the article III "case or controversy" clause.[15] As a result, the decision has been the source of much criticism.[16] Although the Court did not mention the word "standing" in *Frothingham*, the case traditionally has been cited as the beginning point for the law of standing.[17] After *Frothingham*, the Court embarked on a nearly perfect 45-year record, denying standing in cases where plaintiffs sought to challenge governmental action.[18] During that time, *Frothingham* stood as an absolute bar to federal taxpayer suits.[19] The Court departed from this prohibition in only two areas during that period. In *FCC v. Sanders Brothers Radio Station*,[20] the Court allowed the owner of an existing radio station to challenge a Federal Communications Commission order which granted a broadcasting license to a competitor. In *Sanders* and similar cases,[21] the Court reasoned that the plain-

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[11] *See* Berger, *supra* note 8, at 818-19.

[12] 262 U.S. 447 (1923), also cited as *Massachusetts v. Mellon*.

[13] *Id.* at 448. The Court denied standing to a federal taxpayer who sought to challenge the Maternity Act of 1921, ch. 135, 42 Stat. 224 (repealed 1927), as being outside the scope of congressional power.

[14] Scholars have taken issue with the Court's stand that the tax paid by certain corporate taxpayers is minute. Citing THE WORLD ALMANAC 784 (1959), one author contends that the 1958 federal tax of $914,897,000 paid by the American Telephone and Telegraph Co. is far from minute. Comment, *supra* note 6, at 917 n.127.

[15] Flast v. Cohen, 392 U.S. 83, 92 n.6 (1968); 21 VAND. L. REV. 850, 851 (1968); 19 WAYNE L. REV. 221, 223 (1972).

[16] *See, e.g.*, K. DAVIS, *supra* note 10, § 22.09-7, at 753-54 (Supp. 1970); C. WRIGHT, LAW OF FEDERAL COURTS § 13, at 40 (2d ed. 1970); Comment, *supra* note 6, at 915-19.

[17] Berger, *supra* note 8, at 818-19.

[18] *See* Flast v. Cohen, 392 U.S. 83, 85 (1968). Besides *Frothingham*, Professor Davis cites L. Singer & Sons v. Union Pac. R.R., 311 U.S. 295 (1940); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); City of Atlanta v. Ickes, 308 U.S. 517 (1939); and Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939), as cornerstones of the pre-1968 law denying standing. K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.01, at 419-21 (3d ed. 1972). *See also* Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 482 (1972).

[19] Flast v. Cohen, 392 U.S. 83, 92 (1968). *But see* United States v. Butler, 297 U.S. 1 (1936). *Butler* established an exception to the bar against federal taxpayer suits where the tax received from the aggrieved taxpayer is put into the furtherance of the tax scheme itself.

[20] 309 U.S 470 (1940).

[21] *See, e.g.*, FCC v. National Broadcasting Co. (KOA), 319 U.S. 239 (1943); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942).

tiffs' economic stake was sufficient to ensure adequate representation of the public interest. In *Baker v. Carr*[22] and its progeny,[23] the Court allowed standing for persons whose right to vote was impaired by misapportionment of state legislatures. The Court reasoned that the alleged injury to the voter in these cases was a sufficient personal stake to assure adverseness.[24] The development of standing as a separate requirement for federal jurisdiction, however, has undergone an upheaval since 1968[25] when the Court, in *Flast v. Cohen*,[26] sought to clear up the confusion[27] surrounding *Frothingham*. The Court did not overrule *Frothingham*,[28] but it did lower the absolute barrier against taxpayer suits by allowing those suits when federal appropriations allegedly violated specific constitutional requirements.[29] The Court explained that the article III "case or controversy" requirement places a dual limitation on the jurisdiction of federal courts.[30] First, the courts can hear only those cases presented in a proper adversary context. Second, the courts cannot intrude into areas committed to other branches of government. The Court used the term "justiciability" to describe this dual limitation on the jurisdiction of federal courts.[31] Standing, the Court stated, is but one aspect of justiciability and concerns only the first of the article III limitations.[32] *Flast* reaffirmed the *Baker v. Carr* holding that the initial

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[22] 369 U.S. 186 (1962).

[23] *See, e.g.*, Roman v. Sincock, 377 U.S. 695 (1964) (apportionment of state legislature); Wesberry v. Sanders, 376 U.S. 1 (1964) (apportionment of congressional delegation); Gray v. Sanders, 372 U.S. 368 (1963) (gubernatorial election process).

[24] 369 U.S. at 204.

[25] K. DAVIS, ADMINISTRATIVE LAW: CASES-TEXT-PROBLEMS 86 (5th ed. 1973).

[26] 392 U.S. 83 (1968).

[27] *Id.* at 94.

[28] C. WRIGHT, *supra* note 16, § 13, at 40.

[29] Plaintiffs challenged the expenditure of federal funds under the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, tits. I-II, 79 Stat. 27 (pertinent portions codified at 20 U.S.C. §§ 241a *et seq.*, 821 *et seq.* (1970)), *as amended*, 20 U.S.C.A. §§ 241 *et seq.*, 821 *et seq.* (Supp. 1975), alleging the expenditures violated the establishment and free exercise clauses of the first amendment. 392 U.S. at 85-86.

[30] 392 U.S. at 94-95.

[31] *Id.* at 95.

[32] *Id.* at 99-101. The Court explained that a person could have standing and the case could still be dismissed under article III because the issue in controversy was a political question, and therefore not fit for judicial determination. *Id.* at 100. The political question aspect of justiciability, unlike standing, focuses on the substantive issue to be adjudicated and not on the parties themselves. *Id.* at 99-100. According to Professor Wright, the political question doctrine is primarily a function of the doctrine of separation of powers. The doctrine's basic premise is that the courts should not hear a case involving an issue that has been constitutionally committed to a coequal branch of government. C. WRIGHT, *supra* note 16, § 14, at 45-48. The landmark decision of Baker v. Carr, 369 U.S. 186 (1962), described the political question doctrine by stating:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility

inquiry in determining standing must be whether or not the plaintiff has a sufficient personal stake or injury to satisfy the required "concrete adverseness."[33] The Court then set out a two-prong test to be used in ascertaining whether a taxpayer has standing to challenge government action:

> First, the taxpayer must establish a logical link between that status [taxpayer] and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations . . . .[34]

Flast held the establishment clause of the first amendment to be such a "specific constitutional limitation."[35] Whether or not other provisions of the Constitution act as "specific constitutional limitations" on the taxing and spending power of Congress remains unclear. At least one court of appeals, perhaps two, have held that *only* the establishment clause is such a specific limitation.[36] *Flast* viewed

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of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. One author contends that the present role of the political question doctrine, outside the field of foreign relations, is restricted to a "few, narrowly circumscribed issues of constitutional law." Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 596 (1966).

[33] 392 U.S. at 99.

[34] *Id.* at 102-03.

[35] Justice Stewart concurred in the result but viewed the right of a taxpayer challenge as restricted to only the establishment clause. *Id.* at 114. Justice Fortas, in his concurring opinion, agreed with Stewart and implied that a challenge under the establishment clause may be permissible even without taxpayer status. *Id.* at 115-16.

[36] The Court of Appeals for the District of Columbia Circuit in Protestants & Other Ams. United for Separation of Church & State v. Watson, 407 F.2d 1264 (D.C. Cir. 1968), stated that *Flast* set out four requirements that must be met in a taxpayer suit before the taxpayer will be deemed to have standing. These requirements are:

1. That he is in fact a taxpayer;
2. that tax dollars are being expended in the furtherance of specific government business;
3. that there is a *substantial* expenditure; and
4. *that these expenditures exceed the limits imposed by the establishment clause of the first amendment on the taxing and spending powers in Article I.*

Id. at 1265 (emphasis added in 4.). The Court of Appeals for the Fifth Circuit in Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969), cited the *Watson* interpretation of *Flast* but further stated that standing was denied because the appellants had not based their attack on "*any* specific limitation upon Congress' taxing and spending . . . ." *Id.* at 174 (emphasis added). Other courts of appeals have not followed the restrictive view of *Flast*

standing as an essential part of the article III "case or controversy" requirement. In *Association of Data Processing Service Organizations v. Camp*[37] and *Barlow v. Collins*,[38] both decided in 1970, the Court added a different aspect to standing. Both *Data Processing* and *Barlow* involved alleged injury by agency action, rather than congressional action as in *Flast*, and, as a result, both were brought under the Administrative Procedure Act which entitles any person "aggrieved" by agency action to judicial review of that action.[39] In *Data Processing*, a corporation sought to challenge an order of the Comptroller of the Currency. The Court stated that where actions are brought under specific statutory authority the plaintiff must fulfill two requirements in order to have standing. First, the "case or controversy" test enunciated in *Flast* must be met. Second, the interest sought to be protected must be "arguably within the zone of interest" that the statutory provision seeks to protect.[40] *Data Processing* held that this interest need not be economic in nature but may be "aesthetic, conservational or recreational."[41] The two requirements were reiterated in *Barlow*.[42] Although neither *Data Processing* nor *Barlow* exrpessly so stated, it seems that the second test for standing added a nonconstitutional element to the constitutionally mandated requirements declared in *Flast*. This view is reinforced by Justice Brennan's concurring opinion in *Data Processing* and *Barlow*:

> My view is that the inquiry in the Court's first step is the only one

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enunciated in *Watson*. *See* Gibson & Perin Co. v. City of Cincinnati, 480 F.2d 936, 941-42 (6th Cir. 1973); Lamm v. Volpe, 449 F.2d 1202, 1205 (10th Cir. 1971); Pietsch v. President of the United States, 434 F.2d 861, 863 (2d Cir. 1970). The Court in *Flast* left to future determination what clauses are sufficiently specific limitations on the taxing and spending powers of Congress. 392 U.S. at 105.

[37] 397 U.S. 150 (1970).

[38] 397 U.S. 159 (1970).

[39] Administrative Procedure Act § 10, 5 U.S.C. §§ 701 *et seq.* (1970). The Act "applies, according to the provisions thereof except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1970). The Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.* § 702.

[40] 397 U.S. at 153. Professor Davis believes that the zone of interest test is contrary to the purpose of Congress in enacting the Administrative Procedure Act. K. DAVIS, *supra* note 18, § 22.07, at 436-37.

[41] 397 U.S. at 154.

[42] 397 U.S. at 164. Although *Barlow* reiterated the zone of interest test enunciated in *Data Processing*, Davis suggests that the Court made an "unfortunate inadvertance" in applying the zone test in *Barlow*. In *Data Processing*, the Court stated that the zone test concerns whether the particular interest sought to be protected by the complainant is arguably within the zone of interest to be protected by the statute in question. In *Barlow*, Davis points out, the Court mistakenly seeks to determine not whether the particular interest sought to be protected by the complainants (their right not to assign their federal payments in order to rent their farms) was within the zone of interest of the statute in question, but rather whether the general interest of tenant farmers was to be protected by Congress. Davis argues that this mistake goes to the essence of the Court's holding. K. DAVIS, *supra* note 18, § 22.02, at 423-26.

> that need be made to determine standing. I had thought we discarded the notion of any additional requirement when we discussed standing solely in terms of its constitutional content in *Flast v. Cohen* . . . .[43]

Brennan further contended that the Court was confusing the concept of standing with reviewability by adding a second, nonconstitutional requirement to standing.[44] The Court once again distinguished *Data Processing* and *Barlow* from *Flast* in *Sierra Club v. Morton*.[45] The Court held that where the plaintiff does not rely on any specific statutory authority to bring the suit (as the plaintiffs in *Barlow* and *Data Processing* did) the question of standing is determined solely on whether the plaintiff has a sufficient personal stake in the outcome of the litigation.[46] The Court said that it was not enough that the plaintiff had simply a genuine, long-standing interest in the issue unless the interest was coupled with a particular, concrete injury.[47] In denying standing to an environmental group, *Sierra Club* illustrated that, for purposes of standing, injury "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[48] In *Laird v. Tatum*,[49] the Court again stressed actual injury as a prerequisite to standing. *Laird* supplemented the article III requirement of "injury in fact"[50] by holding that the injury the plaintiff alleges must be one that he has already sustained or is in immediate danger of sustaining before the plaintiff will have standing.[51] In 1973, however, in *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*),[52] the Court adopted a liberal approach to the application of the standing test. The Court granted standing to an environmental group that sought to challenge an Interstate Commerce Commission order allowing a railroad rate increase. The Court used the two-prong test to determine standing but in effect held that where environmental action is involved a mere "trifle" of an injury, no matter how commonly shared with others, will suffice to confer standing.[53] *SCRAP* was limited to environmental suits in *Schlesinger v. Reservists Committee to Stop the War*,[54] a companion case to the instant decision. *Schlesinger*

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[43] 397 U.S. at 167.

[44] *Id.* at 168.

[45] 405 U.S. 727 (1972).

[46] *Id.* at 732.

[47] *Id.* at 738-39.

[48] *Id.* at 734-35.

[49] 408 U.S. 1 (1972).

[50] The term "injury in fact" has come to mean the constitutionally mandated requirement that a party must have sustained a specific, personal injury to have standing. Justice Brennan considered the term to be synonymous with the *Flast* holding. Barlow v. Collins, 397 U.S. 159, 168 (1970) (concurring in result, dissenting from handling of standing in both *Data Processing* and *Barlow*). Davis considers the term merely representative of a long-adhered-to requirement that the individual plaintiff must have an interest of his own. It is the extent of the interest required that creates uncertainty in the area. K. Davis, *supra* note 18, §§ 22.05-.06, at 428-31.

[51] 408 U.S. at 13-14.

[52] 412 U.S. 669 (1973).

[53] *Id.* at 689.

[54] 418 U.S. 208 (1974).

expressly reaffirmed that more than an abstract injury shared with the general public is necessary to confer standing in actions which do not raise environmental issues.[55] Since the door to taxpayer suits was first opened by *Flast*, the Court has developed a two-tier test for determining standing based on both constitutional and nonconstitutional considerations. The application of the test varies according to the subject matter of the challenge (environmental action or not) or the object of the attack (Congress or a federal agency), or both.

The Court in the instant case found that the congressional action which respondent challenged was not directed toward the exercise of congressional power under the taxing and spending power of Congress since the respondent did not demonstrate that the challenged enactment exceeded specific limitations of article I, section 8.[56] The Court found no merit in respondent's contention that he could not vote intelligently without detailed information on CIA expenditures.[57] The Court stated that in alleging such an injury the respondent sought to use the federal court as a forum in which to sound his generalized grievances against the operation of the government.[58] Although respondent's interest in the issue may have been genuine, the Court felt the injury was not direct and concrete but an injury which the respondent shared with the general public.[59] Respondent's argument that the Act would go unchallenged if he, as a taxpayer, were not allowed to bring the suit was rejected as irrelevant since the Act could still be challenged through the political process.[60]

Justice Stewart, joined by Justice Marshall, dissented.[61] He contended that the *Frothingham* and *Flast* tests were inapposite to the present case because the issue at hand was of an "entirely different order."[62] He viewed respondent's action as one which sought to determine whether the government was under a duty to provide the requested information rather than one which sought to invalidate a federal statute.[63] Arguably, article I, section 9, imposes an affirma-

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[55] *Id.* at 223.

[56] United States v. Richardson, 418 U.S. 166, 175 (1974).

[57] *Id.* at 176-77. Respondent had alleged this as his only "injury" resulting from the Act.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 179. The Court explained that the respondent could assert his views on the Act by seeking election to Congress or by voting for congressional candidates who share his views on the subject. *Id.*

[61] *Id.* at 202. There were two other dissenting opinions, one by Justice Douglas, *id.* at 197, and one by Justice Brennan, *id.* at 235 (dissenting as to both *Schlesinger* and *Richardson*), plus a concurring opinion by Justice Powell, *id.* at 180. The opinions by Powell and Douglas, though urging opposite results, agreed on two points: (1) No test, *i.e. Flast*, in this complicated area of the law will stand for long; therefore, (2) there can be only an absolute barrier to taxpayer suits or an absolute allowance of taxpayer suits. Powell argued for the former while Douglas urged the adoption of the latter. Justice Brennan continued the argument he first put forth in his concurrence to *Barlow* and *Data Processing* by arguing that the respondent has standing because he has incurred an "injury in fact" to his right to vote.

[62] *Id.* at 202.

[63] *Id.*

tive duty on the government to publish a statement of federal receipts and expenditures.[64] If the duty exists, respondent, as a voter-taxpayer, possesses a corresponding right of access to such information.[65] The dissent maintained that where a citizen alleges a breach of this duty, he has standing to litigate its possible existence.[66]

Standing has been a complicated, unclear, and difficult body of law since its inception.[67] In *United States ex rel. Chapman v. FPC*,[68] the Court described the doctrine as a "complicated specialty of federal jurisdiction." One author has termed standing a "mass of confused logic-chopping about bewildering technicalities."[69] Its stated purpose is to ensure a proper plaintiff,[70] but the line of cases on the subject, beginning with *Frothingham*, indicates the difficulty the Court has in stating specific guidelines for achieving that purpose. The Court seems to have developed two distinct sets of criteria for determining standing in two different types of suits.[71] First, in suits brought by taxpayers challenging government action without statutory authority, there is a constitutionally mandated requirement.[72] Second, in suits brought under specific statutory authority, there is both the constitutionally mandated requirement and a nonconstitutional standard.[73] *Richardson* clearly falls into the first category. The Court reaffirmed that the requirement of standing is founded on an article III "case or controversy" calculus.[74] But *Richardson* seems to mix the traditional article III requirement that federal courts hear only cases presented in an adversary context with another article III requirement which has never before been expressly applied to the doctrine of standing. The political question doctrine, a discrete article III requirement, holds that federal courts cannot intrude into policy areas committed to other coequal branches of government.[75] The Court implied that the doctrine was an underlying consideration in its result by stating that the

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[64] *Id.*

[65] *Id.* at 202-03.

[66] *Id.*

[67] *See* K. Davis, *supra* note 18, § 22.01, at 419; Jaffe, *Standing to Secure Judicial Review, Public Actions*, 74 Harv. L. Rev. 1265, 1266-67 (1972); Sedler, *supra* note 18, at 480; Comment, *supra* note 7, at 1671.

[68] 345 U.S. 153, 156 (1953).

[69] Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 628 (1968).

[70] K. Davis, *supra* note 18, § 22.04, at 427.

[71] The Court has developed a multiplicity of requirements for standing that vary with the issue and the status of the plaintiff involved. For a good overview, see Sedler, *supra* note 18, at 488-511. For the purpose of this note, attention is given to the requirements of standing in an action to challenge the legality of an act of the federal government.

[72] Flast v. Cohen, 392 U.S. 83, 105-06 (1968); *see* Schiaffo v. Helstoski, 492 F.2d 413, 419-23 (3d Cir. 1974); Mattola v. Nixon, 464 F.2d 178 (9th Cir. 1972); Lamm v. Volpe, 449 F.2d 1202 (10th Cir. 1971); Pietsch v. President of the United States, 434 F.2d 861, 863 (2d Cir. 1970).

[73] *E.g.*, Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970); Hardin v. Kentucky Util., 390 U.S. 1 (1968); Schafly v. Volpe, 495 F.2d 273 (7th Cir. 1974); Gibson & Perin Co. v. City of Cincinnati, 480 F.2d 936 (6th Cir. 1973).

[74] 418 U.S. at 171-74.

[75] *See* note 32 *supra*.

matter respondent sought to litigate was correctable only through the political process.[76] *Richardson* is not clear on this point, however, and it remains to be seen whether the law of standing will swallow the political question doctrine in taxpayer suits. Although the Court reaffirmed the authority for taxpayer suits, it has limited their scope by interpreting the *Flast* test very narrowly. The statute which respondent challenged deals indirectly with Congress' power under the taxing and spending clause.[77] The Act, entitled "Central Intelligence Agency; appropriations; expenditures," directs how money appropriated to the CIA is to be accounted for by that agency.[78] The Court, however, refused to accept this interpretation.[79] Therefore, based on *Richardson*, a taxpayer may challenge only acts of Congress directly addressed to the taxing and spending clause. Further, article I, section 9, could be interpreted as setting a specific constitutional limitation upon the taxing and spending power of Congress. It specifically requires "a regular Statement and Account of the Receipts and Expenditures of all public Money . . . ." It appears that there is no constitutional limitation on the taxing and spending power more specific.[80] The Court also rejected this argument, however.[81] Congress has provided judicial review of designated administrative actions for citizens adversely affected by those actions.[82] These statutes indicate a congressional tendency toward a more liberal view of citizen standing to challenge actions of the federal government[83] although the action provided for in these statutes involves statutory rather than constitutional violations such as were alleged in *Richardson*. *Richardson* may not arouse public demands for more congressional action to liberalize standing in all areas of the law. It may, however, lead to dismissals for lack of standing in more controversial cases, and such dismissals could eventually result in a public outcry for congressional action. The Court could have avoided the questionable limitation it placed on the *Flast* test by holding that the respondent met the necessary test for standing but that the document given respondent by the Department of Treasury[84] met the disclosure requirements of article I, section 9. A decision on the merits would have avoided limiting the scope of taxpayer suits. Moreover, the Court could have used *Richardson* as a vehicle for explicating the phrase, "specific constitutional limitation," coined in *Flast* in

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[76] 418 U.S. at 179.

[77] Justice Powell, in his concurrence in the instant case, agrees with this interpretation. *Id.* at 184.

[78] Central Intelligence Agency Act, ch. 227, § 10(b), 50 U.S.C. § 403j(b) (1970).

[79] 418 U.S. at 174-75.

[80] *See id.* at 184 (Powell, J., concurring); *cf.* M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 187-88 (1913).

[81] *See* 418 U.S. at 175. The Court rejected this contention in a single sentence. Further, it did not reach the question of whether or not it viewed the establishment clause as the sole specific limitation on the taxing and spending power of Congress, as some courts of appeals have held. *See* note 36 *supra*.

[82] *See, e.g.*, Administrative Procedure Act § 10, 5 U.S.C. §§ 701 *et seq*. (1970); Davis, *supra* note 69, at 618-19 (list of statutes).

[83] *See* Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 154 (1970); Davis, *supra* note 69, at 618.

[84] *See* note 1 *supra*.

order to delimit those violations of the taxing and spending clause which are subject to taxpayer challenge. Scholars have long argued the desirability of allowing taxpayer suits,[85] and certain compelling policies have been put forward that possibly should have influenced the Court to allow a broader scope of taxpayer review. These include instigation of increased individual participation in the federal government as a result of a broad allowance of taxpayer suits;[86] encouragement of suits at the state and local level which could help to prevent official misconduct;[87] protection of the public interest in addition to protection of the individual taxpayer bringing suit; and support for the public's assumption that a tax paid will not be spent in violation of the Constitution.[88] Allowing a wide range of taxpayer suits to challenge allegedly unconstitutional expenditures would serve to ensure public support of the tax system. Nevertheless, under the standing test announced in *Richardson*, a federal taxpayer attacking governmental expenditures should be prepared to prove (1) a direct, personal injury and (2) the *direct* relation of the alleged impropriety to the taxing and spending power of Congress.

William L. Smith

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[85] *See, e.g.*, K. DAVIS, *supra* note 25, at 84-88; L. JAFFE, *supra* note 6, at 483; *cf.* Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After Flast v. Cohen*, 36 U. CHI. L. REV. 364 (1969); Davis, *The Case of the Real Taxpayer: A Reply to Professor Bittker*, 36 U. CHI. L. REV. 375 (1969). The two most often-cited authorities in the field, Davis and Jaffe, while urging the expansion of the use of taxpayer suits, have bitterly fought over the extent and method of the expansion. *See* K. DAVIS, *supra* note 18, § 22.05, at 428.

[86] *See* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1044 (1968). This does not necessarily mean overloading the dockets of the federal courts. K. DAVIS, *supra* note 25, at 88, points out how few taxpayer suits have been initiated in federal courts since *Flast*.

[87] *Cf.* L. JAFFE, *supra* note 6, at 486.

[88] *See* 21 VAND. L. REV. 850, 854 (1968).

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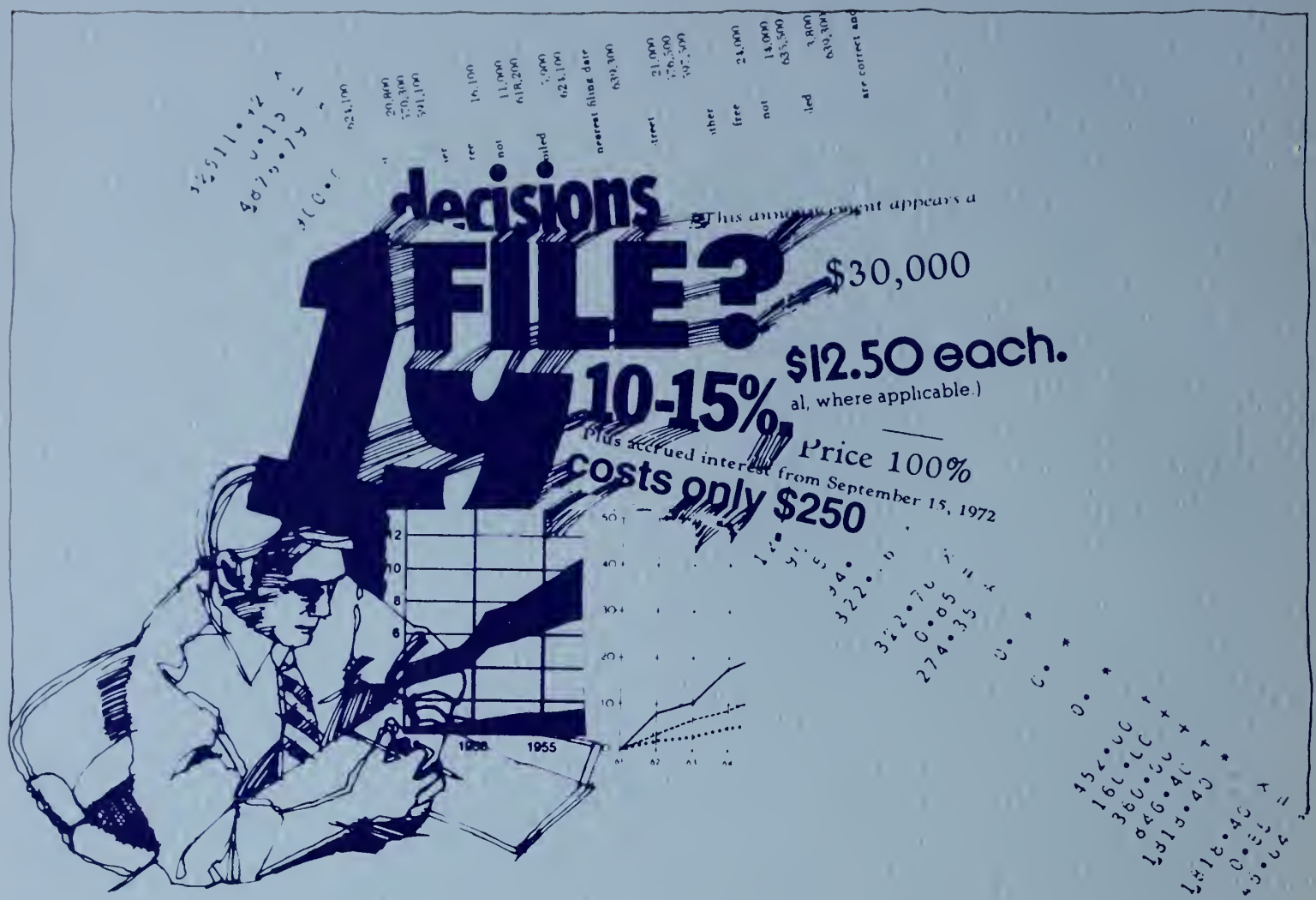

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